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United Nations

Report of the International Law Commission

Fifty-eighth session
(1 May-9 June and 3 July-11 August 2006)

General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)

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CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its fifty-eighth session from 1 May to 9 June 2006 and the second part from 3 July to 11 August 2006 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Djamchid Momtaz, Chairman of the Commission at its fifty-seventh session.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain M. Al-Baharna (Bahrain)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. João Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique Candioti (Argentina)
Mr. Choung Il Chee (Republic of Korea)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Riad Daoudi (Syrian Arab Republic)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzisław Galicki (Poland)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Fathi Kemicha (Tunisia)
Mr. Roman Anatolyevitch Kolodkin (Russian Federation)
Mr. Martti Koskenniemi (Finland)

Mr. William R. Mansfield (New Zealand)

Mr. Michael J. Matheson (United States)

Mr. Theodor Viorel Melescanu (Romania)

Mr. Djamchid Momtaz (Islamic Republic of Iran)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Didier Opertti Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Victor Rodríguez Cedeño (Venezuela)

Mr. Eduardo Valencia-Ospina (Colombia)[1]

Ms. Hanqin Xue (China)

Mr. Chusei Yamada (Japan).

3. At its 2867th meeting on 1 May 2006, the Commission elected Mr. Eduardo Valencia-Ospina (Colombia) to fill the casual vacancy caused by the election of Mr. Bernardo Sepúlveda to the International Court of Justice.

B. Officers and the Enlarged Bureau

4. At its 2867th meeting on 1 May 2006, the Commission elected the following officers:

Chairman:	Mr. Guillaume Pambou-Tchivounda
First Vice-Chairman:	Mr. Giorgio Gaja
Second Vice-Chairman:	Mr. Victor Rodríguez Cedeño
Chairman of the Drafting Committee:	Mr. Roman A. Kolodkin
Rapporteur:	Ms. Hanqin Xue

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[1] See paragraph 3.

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[2] and the Special Rapporteurs.[3]

6. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. G. Gaja (Chairman), Mr. E.A. Addo, Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. Z. Galicki, Mr. P. Kabatsi, Mr. M. Kamto, Mr. J.L. Kateka, Mr. F. Kemicha, Mr. R.A. Kolodkin, Mr. T.V. Melescanu, Mr. D. Momtaz, Mr. B. Niehaus, Mr. A. Pellet, Mr. P.S. Rao, Mr. E. Valencia-Ospina, Mr. C. Yamada and Ms. H. Xue (ex officio).

C. Drafting Committee

7. At its 2871st, 2874th, 2880th and 2881st meetings on 5, 11, 23 and 30 May 2006 respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Diplomatic protection: Mr. R.A. Kolodkin (Chairman), Mr. J. Dugard (Special Rapporteur), Mr. I. Brownlie, Mr. E. Candioti, Mr. C.I. Chee, Mr. C. Economides, Ms. Paula Escarameia, Mr. G. Gaja, Mr. F. Kemicha, Mr. W. Mansfield, Mr. M.J. Matheson, Mr. D. Momtaz, Mr. C. Yamada and Ms. H. Xue (ex officio).

(b) International liability for injurious consequences arising out of acts not prohibited by international law (international liability in the case of loss from transboundary harm arising out of hazardous activities): Mr. R.A. Kolodkin (Chairman), Mr. P.S. Rao (Special Rapporteur), Mr. J.C. Baena Soares, Mr. E. Candioti, Mr. C.I. Chee, Mr. R. Daoudi, Ms. P. Escarameia, Mr. G. Gaja, Mr. M. Koskenniemi, Mr. W. Mansfield, Mr. M.J. Matheson, Mr. C. Yamada and Ms. H. Xue (ex officio).

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[2] Mr. J.C. Baena Soares, Mr. E. Candioti, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. D. Momtaz, Mr. A. Pellet, Mr. P.S. Rao and Mr. C. Yamada.

[3] Mr. I. Brownlie, Mr. C.J.R. Dugard, Mr. G. Gaja, Mr. Z. Galicki, Mr. M. Kamto, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño and Mr. C. Yamada.

(c) Reservations to treaties: Mr. R.A. Kolodkin (Chairman), Mr. A. Pellet (Special Rapporteur), Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. M.J. Matheson, Mr. C. Yamada and Ms. H. Xue (ex officio).

(d) Responsibility of international organizations: Mr. R.A. Kolodkin (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. C.P. Economides, Ms. P. Escarameia, Mr. W. Mansfield, Mr. M.J. Matheson, Mr. D. Momtaz, Mr. E. Valencia-Ospina, Mr. C. Yamada and Ms. H. Xue (ex officio).

(e) Shared natural resources: Mr. R.A. Kolodkin (Chairman), Mr. C. Yamada (Special Rapporteur), Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. W. Mansfield, Mr. M.J. Matheson, Mr. G. Pambou-Tchivounda and Ms. H. Xue (ex officio).

8. The Drafting Committee held a total of 28 meetings on the five topics indicated above.

D. Working Groups

9. At its 2868th, 2877th and 2888th meetings on 2 and 17 May and 5 July 2006 respectively, the Commission also re-established the following Working Groups and Study Group:

(a) Working Group on Shared natural resources: Mr. E. Candioti (Chairman), Mr. C. Yamada (Special Rapporteur), Mr. J.C. Baena Soares, Mr. P. Comissário Afonso, Mr. R. Daoudi, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. P. Kabatsi, Mr. W. Mansfield, Mr. M.J. Matheson, Mr. D. Opertti Badan, Mr. P.S. Rao and Ms. H. Xue (ex officio).

(b) Study Group on Fragmentation of international law: difficulties arising from the diversification and expansion of international law (open-ended)

Chairman: Mr. M. Koskenniemi

(c) Working Group on Unilateral acts of States (open-ended)

Chairman: Mr. A. Pellet

10. The Working Group on Long-term programme of work was re-established and was composed of the following members: Mr. A. Pellet (Chairman), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Koskenniemi and Ms. H. Xue (ex officio).

E. Secretariat

11. Mr. Nicolas Michel, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Principal Legal Officer, served as Principal Assistant Secretary, Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary. Mr. Arnold Pronto, Legal Officer, Mr. Michele Ameri and Mr. Gionata Buzzini, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

12. At its 2867th meeting, on 1 May 2006, the Commission adopted an agenda for its fifty-eighth session consisting of the following items:

1. Organization of work of the session.
2. Diplomatic protection.
3. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities).
4. Responsibility of international organizations.
5. Shared natural resources.
6. Unilateral acts of States.
7. Reservations to treaties.
8. Expulsion of aliens.
9. Effects of armed conflicts on treaties.
10. The obligation to extradite or prosecute (*aut dedere aut judicare*).

11. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.

12. Programme, procedures and working methods of the Commission and its documentation.

13. Cooperation with other bodies.

14. Date and place of the fifty-ninth session.

15. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-EIGHTH SESSION

13. Concerning the topic "Diplomatic protection", the Commission considered the seventh report of the Special Rapporteur (A/CN.4/567). The Commission subsequently completed the second reading of the topic. The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on Diplomatic Protection (Chap. IV).

14. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)", the Commission considered the third report of the Special Rapporteur (A/CN.4/566). The Commission subsequently completed the second reading of the topic. The Commission decided, in accordance with article 23 of its Statute, to recommend that the Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them (Chap. V).

15. Concerning the topic "Shared natural resources", the Commission established a Working Group on Transboundary Groundwaters to complete the consideration of the draft articles submitted by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1 and Add.1); referred 19 revised draft articles to the Drafting Committee; and subsequently adopted on first reading a set of draft articles on the law of transboundary aquifers, together with commentaries (Chap. VI).

16. Concerning the topic "Responsibility of international organizations", the Commission considered the fourth report of the Special Rapporteur (A/CN.4/564 and Add.1 and 2) and adopted 14 draft articles together with commentaries dealing with circumstances precluding wrongfulness and with the responsibility of a State in connection with the act of an international organization (Chap. VII).

17. Concerning the topic "Reservations to treaties", the Commission considered the second part of the Special Rapporteur's tenth report (A/CN.4/558/Add.1 and 2) and referred to the Drafting Committee 16 draft guidelines dealing with the definition of the object and purpose of

the treaty and the determination of the validity of reservations. The Commission also adopted five draft guidelines dealing with validity of reservations, together with commentaries. In addition, the Commission reconsidered two draft guidelines dealing with the scope of definitions and the procedure in case of manifestly invalid reservations which were previously adopted, in the light of new terminology (Chap. VIII).

18. With regard to the topic "Unilateral acts of States", the Commission considered the ninth report of the Special Rapporteur (A/CN.4/569 and Add.1) which contained 11 draft principles and reconstituted the Working Group on Unilateral Acts with the mandate to elaborate conclusions and principles on the topic. The Commission adopted a set of 10 Guiding Principles together with commentaries relating to unilateral declarations of States capable of creating legal obligations and commended the Guiding Principles to the attention of the General Assembly (Chap. IX).

19. As regards the topic "Effects of armed conflicts on treaties", the Commission considered the second report of the Special Rapporteur (A/CN.4/570 and Corr.1) (Chap. X).

20. Concerning the topic "The obligation to extradite or prosecute (*'aut dedere aut judicare'*)", the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/571) (Chap. XI).

21. As regards the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", the Commission considered the report of the Study Group and took note of its 42 conclusions (Chap. XII), which it commended to the attention of the General Assembly. The report and its conclusions were prepared on the basis of an analytical Study finalized by the Chairman of the Study Group, which summarised and analysed the phenomenon of fragmentation taking account of studies prepared by various members of the Study Group, as well as discussion within the Study Group itself (A/CN.4/L.682 and Corr.1). The Commission requested that the analytical study be made available on its website and be published in its *Yearbook*.

22. The Commission established a Planning Group to consider its programme, procedures and working methods (Chap. XIII, sect. B.2). The Commission reiterated its view that an *a priori* limitation cannot be placed on the length of its documentation; it recommended that the

Codification Division prepare the seventh edition of "Work of the International Law Commission", and also decided to include in its long-term programme of work the following topics: "Immunity of State officials from foreign criminal jurisdiction", "Jurisdictional immunity of international organizations", "Protection of persons in the event of disasters", "Protection of personal data in the transborder flow of information", and "Extraterritorial jurisdiction" (Chap. XIII, sect. B.1).

23. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, and the Inter-American Juridical Committee. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (Chap. XIII, sect. D).

24. A training seminar was held with 25 participants of different nationalities (Chap. XIII, sect. F).

25. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 7 May to 8 June 2007 and 9 July to 10 August 2007 (Chap. XIII, sect. C).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

A. Shared natural resources

26. In view of its completion on first reading of the draft articles on the law of transboundary aquifers, the Commission would welcome from Governments:

(a) Their comments and observations on all aspects of the draft articles;

(b) Their comments and observations on the commentaries to the draft articles;

(c) Their views on the final form of the draft articles.

B. Responsibility of international organizations

27. The Commission would welcome comments and observations from Governments and international organizations on draft articles 17 to 30, in particular on those relating to responsibility in case of provision of competence to an international organization (draft article 28) and to responsibility of a State member of an international organization for the internationally wrongful act of that organization (draft article 29).

28. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be addressed in the next report:

(a) Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?

(b) According to article 41, paragraph 1, on Responsibility of States for internationally wrongful acts, when a State commits a serious breach of an obligation under a peremptory norm of general international law, the other States are under an obligation to cooperate to bring the breach to an end through lawful means. Should an international organization commit a similar breach, are States and also other international organizations under an obligation to cooperate to bring the breach to an end?

C. Reservations to treaties

29. The Commission recommended that the Secretariat, in consultation with the Special Rapporteur on reservations to treaties, organize a meeting, during the fifty-ninth session of the Commission, with United Nations experts in the field of human rights, including representatives of monitoring bodies, in order to hold a discussion on issues relating to reservations to human rights treaties. In that perspective, the Commission would appreciate receiving the views of Governments on adjustments that they would consider it necessary or useful to introduce in the "Preliminary conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties", adopted by the Commission at its forty-ninth session.[4]

D. The obligation to extradite or prosecute (*aut dedere aut judicare*)

30. The Commission would welcome any information that Governments may wish to provide concerning their legislation and practice with regard to this topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;

(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.

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[4] *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

31. The Commission would also welcome any further information that Governments may consider relevant to the topic.

E. Other decisions and conclusions of the Commission

32. With regard to the long-term programme of work, the Commission would welcome the views of Governments on the following (para. 33).

33. In 1978, the Commission adopted draft articles on most-favoured-nation clauses.[5] In view of the circumstances at the time, the General Assembly took no action in respect to this draft, which clearly is out of date in many aspects today. Some members of the Commission believe that the topic should not be reopened in the Commission at this time, in that the basic policy differences that caused the General Assembly to take no action on the Commission's draft articles have not yet been resolved, and should first be dealt with in international forums that have the necessary technical expertise and policy mandate. Other members consider that, given the changes in the international situation and the continued importance of the most-favoured-nation clause in contemporary treaties, in particular in the fields of trade law and international investments, the time has come to undertake further work on the question and therefore to include the topic in the Commission's long-term programme of work.

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[5] *Yearbook ... 1978*, vol. II (Part Two), pp. 16-73, para. 74.

CHAPTER IV

DIPLOMATIC PROTECTION

A. Introduction

34. At its forty-seventh session (1995), the Commission endorsed the recommendation of the Working Group on the long-term programme of work in favour of the topic, and decided, subject to the approval of the General Assembly, to include it on its agenda.[6] At its forty-eighth session (1996), the Commission identified "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[7] The General Assembly, in its resolution 51/160 of 16 December 1996, subsequently invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make.[8]

35. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

36. The General Assembly, in resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

37. At its fiftieth session (1998), the Commission had before it the preliminary report of the Special Rapporteur.[9]

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[6] See *Yearbook ... 1995*, vol. II (Part Two), para. 501. The General Assembly, in resolution 50/45 of 11 December 1995, noted the Commission's suggestion to include the topic on its agenda.

[7] See *Yearbook ... 1996*, vol. II (Part Two), para. 248, and annex II, addendum 1.

[8] See A/51/358 and Add.1. Pursuant to General Assembly resolution 51/160, the Commission established a Working Group on the topic at its forty-ninth session (1997). The Working Group submitted a report at the same session, which was endorsed by the Commission. (*Yearbook ... 1997*, vol. II (Part Two), para. 171.) The Working Group proposed an outline for consideration of the topic, which the Commission recommended be used as the basis for the submission of a preliminary report by the Special Rapporteur (*ibid.*, paras. 189-190).

[9] A/CN.4/484. At the same session, the Commission established an open-ended Working Group to consider possible conclusions that might be drawn on the basis of the discussion on the approach to the topic (see *Yearbook ... 1998*, vol. II (Part Two), para. 108).

38. At its fifty-first session (1999), the Commission appointed Mr. Christopher John Robert Dugard, Special Rapporteur for the topic, after Mr. Bennouna was elected a judge of the International Criminal Tribunal for the Former Yugoslavia.

39. The Special Rapporteur subsequently submitted five reports[10] from the fifty-second (2000) to fifty-sixth sessions (2004) of the Commission. At its fifty-sixth session (2004), the Commission adopted on first reading a set of 19 draft articles on diplomatic protection together with commentaries.[11] At the same meeting, the Commission decided, in accordance with draft articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.[12]

40. At its fifty-seventh session (2005), the Commission had before it the sixth report of the Special Rapporteur, dealing with the clean hands doctrine.[13]

B. Consideration of the topic at the present session

41. At the present session, the Commission had before it comments and observations received from Governments on the draft articles adopted on first reading in 2004,[14] as well as the seventh report of the Special Rapporteur,[15] containing proposals for the consideration of draft

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[10] See A/CN.4/506 and Corr.1 and Add.1 (draft articles 1 to 9), A/CN.4/514 and Corr.1 and 2 (Spanish only) (draft articles 10 to 13), A/CN.4/523 and Add.1 (draft articles 14 to 16), A/CN.4/530 and Corr.1 (Spanish only) and Add.1 (draft articles 17 to 22), and A/CN.4/538 (draft articles 23 to 27). During this period, the Commission established three informal consultations: on draft articles 1, 3 and 6 (at its fifty-second session (2000) (*Yearbook … 2000*, vol. II (Part Two), para. 495)), on draft article 9 (at its fifty-third session (2001)) and on the question of the diplomatic protection of crews as well as that of corporations and shareholders (at its fifty-fourth session (2002)). The Commission further established a Working Group at its fifty-fifth session (2003) to consider draft article 17, paragraph (2) (see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 90-92).

[11] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 59-60.

[12] *Ibid.*, para. 57.

[13] A/CN.4/546. The Commission further considered several other issues related to the draft articles adopted on first reading in 2004 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 237-241).

[14] A/CN.4/561 and Add.1 and 2. A set of comments and observations were also submitted by Kuwait on 1 August 2006. The Commission did not have the opportunity to consider these comments and observations as they were received after the adoption of the draft articles on second reading. Those comments and observations are contained in A/CN.4/575.

[15] A/CN.4/567.

articles 1 to 19 on second reading, as well as a proposal for an additional draft article, in light of the comments and observations received from Governments. The Commission considered the report of the Special Rapporteur at its 2867th to 2871st meetings, held from 1 to 5 May 2006.

42 At its 2871st meeting, held on 5 May 2006, the Commission instructed the Drafting Committee to commence the second reading of the draft articles taking into account the comments of Governments, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's seventh report. The Commission further decided to refer to the Drafting Committee the Special Rapporteur's proposal for an additional draft article.

43. The Commission considered the report of the Drafting Committee (A/CN.4/L.684 and Corr.1 and 2) at its 2881st meeting, held on 30 May 2006, and adopted the entire set of draft articles on diplomatic protection, on second reading, at the same meeting.

44. At its 2906th to 2909th meetings, held on 4, 7 and 8 August 2006, the Commission adopted the commentaries to the aforementioned draft articles.

45. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

46. At its 2909th meeting, on 8 August 2006, the Commission decided in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on Diplomatic Protection.

D. Tribute to the Special Rapporteur

47. At its 2909th meeting, held on 8 August 2006 the Commission, after adopting the draft articles on diplomatic protection, adopted the following resolution by acclamation:

> "*The International Law Commission,*
>
> *Having adopted* the draft articles on diplomatic protection,

Expresses to the Special Rapporteur, Mr. Christopher John Robert Dugard, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on diplomatic protection."

48. The Commission also expressed its deep appreciation to the previous Special Rapporteur, Mr. Mohammed Bennouna, for his valuable contribution to the work on the topic.

E. Text of the draft articles on diplomatic protection

1. Text of the draft articles

49. The text of the draft articles adopted by the Commission at its fifty-eighth session is reproduced below.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11

Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(*a*) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(*b*) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(*d*) The injured person is manifestly precluded from pursuing local remedies; or

(*e*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17

Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18

Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19

Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(*a*) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(*b*) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(*c*) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.[16] The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.[17] Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.[18]

(2) Diplomatic protection belongs to the subject of "Treatment of Aliens". No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the

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[16] *Yearbook ... 1956*, vol. II, pp. 173-231, *Yearbook ... 1957*, vol. II, pp. 104--30, *Yearbook ... 1958*, vol. II, pp. 47-73, *Yearbook ... 1959*, vol. II, pp. 1-36, *Yearbook ... 1960*, vol. II, pp. 41-68, and *Yearbook ... 1961*, vol. II, pp. 1-54.

[17] *Ibid., Official Records of the General Assembly Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary on article 44, footnotes 722 and 726.

[18] Articles 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.

treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

> "The responsibility of a State may not be invoked if:
>
> "(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
>
> "(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as "functional protection". Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the *Reparation for Injuries* case: "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the

Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. …"[19]

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,[20] maintain the distinction between primary and secondary rules and deal only with the latter.

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[19] Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, *I.C.J. Reports 1949*, p. 174 at pp. 185-186.

[20] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, general commentary, paras. (1) to (3).

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that "whoever ill-treats a citizen indirectly injures the State, which must protect that citizen,"[21] and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law".[22] Obviously it is a fiction - and an exaggeration[23] - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not "in reality" - to quote *Mavrommatis* - assert its own right only. "In reality" it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign

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[21] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, vol. III (1758, English translation by C.G. Fenwick, Carnegie Institution, Washington 1916), chap. VI, p. 136.

[22] *Mavrommatis Palestine Concessions* (*Greece v. U.K.*) *P.C.I.J. Reports*, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railway* case (*Estonia v. Lithuania*) *P.C.I.J. Reports*, 1939, Series A/B, No. 76, p. 16.

[23] J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace, 6th edition* (Oxford: Clarendon Press, 1963), Sir H. Waldock (ed), pp. 276-7.

Governments. This has been recognized by the International Court of Justice in the *La Grand*[24] and *Avena* cases.[25] This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts.[26] It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between "diplomatic action" and "judicial proceedings" when

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[24] *La Grand* case (*Germany v. United States of America*) *I.C.J. Reports 2001*, p. 466 at paras. 76-77.

[25] *Case concerning Avena and Other Mexican Nationals* (*Mexico v. United States of America*) *I.C.J. Reports*, 2004, p. 12 at para. 40.

[26] See Chapter 1 of Part Three titled "Invocation of the Responsibility of a State" (articles. 42-48). Part Three itself is titled "The implementation of the International Responsibility of a State".

describing the action that may be taken by a State when it resorts to diplomatic protection.[27] Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under "other means of peaceful settlement". "Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. "Other means of peaceful settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

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[27] *Mavrommatis Palestine Concessions*, *op. cit.*, *Panevezyś-Saldutiskis Railway* case, *op. cit.*, p. 4 at p. 16; *Nottebohm* case (*Liechtenstein v. Guatemala*), Second Phase Judgment, *I.C.J. Reports 1955*, p. 4 at p. 24.

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary,[28] that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.[29]

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961[30] and the Vienna Convention on Consular Relations of 1963.[31] Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term "national" in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

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[28] See general commentary, para. (3).

[29] *Reparation for Injuries, I.C.J. Reports 1949*, p. 174.

[30] United Nations, *Treaty Series*, vol. 500, p. 95.

[31] United Nations, *Treaty Series*, vol. 596, p. 261.

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1[32] it is neutral on this subject.

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the *Barcelona Traction* case:

> "… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".[33]

(3) Today there is support in domestic legislation[34] and judicial decisions[35] for the view that there is some obligation, however limited, either under national law or international law, on the

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[32] See commentary to article 1, paras. (3) to (5).

[33] *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 4 at p. 44.

[34] See the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 80-87.

[35] *Rudolf Hess* case, ILR vol. 90, p. 387; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM vol. 44 (2005), p. 173.

State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection "should … give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred" (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

(4) Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

(2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

> For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

> "in the present state of international law, questions of nationality are … in principle within the reserved domain".[36]

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

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[36] *Nationality Decrees issued in Tunis and Morocco (French Zone), advisory opinion. P.C.I.J. Reports, Series B,* No. 4, 1923, at p. 24.

"It is for each State to determine under its own law who are its nationals."[37]

More recently it has been endorsed by the 1997 European Convention on Nationality.[38]

(3) The connecting factors for the conferment of nationality listed in draft article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*jus soli*), descent (*jus sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.[39] Nationality may also be acquired as a result of the succession of States.[40]

(4) The connecting factors listed in draft article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,[41] as an additional factor for the

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[37] League of Nations, *Treaty Series*, vol. 179, p. 89.

[38] United Nations, *Treaty Series*, vol. 2135, p. 213, article 3.

[39] See, e.g., article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, p. 13, and article 1 of the Convention on the Nationality of Married Women, *ibid.*, vol. 309, p. 65, which prohibit the acquisition of nationality in such circumstances. See para. (6) below.

[40] See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *Yearbook ... 1999*, vol. II (Part Two), para. 47.

[41] In the *Nottebohm* case the International Court of Justice stated: "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection which has made him its national", *op. cit.* at p. 23.

exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were "extremely tenuous"[42] compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[43] This suggests that the Court did not intend to expound a general rule[44] applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

(6) The final phrase in draft article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that "it is for each State to determine under its own law who are its nationals" with the proviso "[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality".[45] Today, conventions, particularly in the field of human rights,

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[42] *Ibid.*, p. 25.

[43] *Ibid.*, p. 26.

[44] This interpretation was placed on the *Nottebohm* case by the Italian-United States Conciliation Commission in the *Flegenheimer* case, ILR vol. 25 (1958), p. 148.

[45] See also article 3 (2) of the 1997 European Convention on Nationality.

require States to comply with international standards in the granting of nationality.[46] For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

> "States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."[47]

(7) Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner "not inconsistent with international law". The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a "margin of appreciation" in deciding upon the conferment of nationality[48] and that there is a presumption in favour of the validity of a State's conferment of nationality.[49]

(8) Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his

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[46] This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights", at para. 35. See also ILR vol. 79, p. 296.

[47] See also article 20 of the American Convention on Human Rights, United Nations, *Treaty Series*, vol. 1144, p. 123; article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195; and article 1 of the Convention on the Nationality of Married Women.

[48] See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, paras. 62-63.

[49] R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (London and New York: Longman, 1992), p. 856.

former State of nationality.[50] If, however, the acquisition of nationality in such circumstances results in the loss of the individual's former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on *Namibia*[51] that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

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[50] See article 2 of the Convention on the Nationality of Married Women.

[51] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 56, para. 125.

Commentary

(1) Although the continuous nationality rule is well established,[52] it has been subjected to considerable criticism[53] on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to "nationality shopping" for the purpose of diplomatic protection.[54] For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.[55] For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates.[56] It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

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[52] See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the *Kren* claim, ILR vol. 20, p. 233 at p. 234.

[53] See the comment of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case, at pp. 101-102; see, too, E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990).

[54] See the statement of Umpire Parker in *Administrative Decision No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 141 (1925): "Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims."

[55] H. Briggs, "La protection diplomatique des individus en droit international: La nationalité des Réclamations", *Annuaire de l'Institut de Droit International*, vol. 51 (1965-I), p. 5 at pp. 72-73.

[56] Warsaw Session, 1965, *Annuaire de l'Institut de Droit International*, vol. 51 (1965-II), pp. 260-262.

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim.[57] The phrase "presentation of the claim" is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The word "official" has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The *dies ad quem* for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection.[58] In 2003 in *Loewen Group Inc. v. USA*[59] an ICSID arbitral tribunal held that "there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through to the date of the resolution of the claim, which date is known as the *dies ad quem*". On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket

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[57] See the dictum of Umpire Parker in *Administrative Decisions No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 143.

[58] R.Y. Jennings and A. Watts, *Oppenheim's International Law*, *op. cit.* at p. 512. *Eschauzier* claim (*Great Britain v. Mexico*) UNRIAA vol. V, p. 207.

[59] ICSID Reports, vol. 7 (2005), p. 442 at para. 225.

rule that nationality must be maintained to the date of resolution of the claim.[60] Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the *dies ad quem*. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection - a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

(6) The word "claim" in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

(7) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality

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[60] For criticism of the *Loewen* case, see J. Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005), pp. 183-4.

will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission's articles on Nationality of Natural Persons in relation to the Succession of States.

(10) As stated above,[61] fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

(11) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

(12) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

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[61] See para. (1) of commentary to the present draft article.

(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loewen Group Inc v. USA* and a number of other cases[62] in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Mavrommatis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national.[63] The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State.[64] Where the heir has the nationality of the respondent State it is clear that no such claim may be brought.[65] There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national

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[62] *Ebenezer Barston* in G.H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 805; *Executors of F. Lederer* in *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. 3, p. 763; *Hawaiian Claims* in F.K. Nielson, *America and British Claims Arbitration* (1926), p. 30; *Chopin* in *French and American Claims Commission, 1880-1884;* vol. 60, Records of Claims; *Gribble*, Report of Robert S. Hale Esq. [1873, Part II, vol. III], U.S. Foreign Relations 14 (1874).

[63] See commentary to art. 1, para. (3).

[64] *Eschauzier* claim, UNRIAA vol. IV, p. 207; *Kren* claim; *Gleadell* claim (*Great Britain v. Mexico*) UNRIAA vol. V, p. 44; *Sed contra*, *Straub* claim, ILR vol. 20, p. 228.

[65] *Stevenson* claim (*Great Britain v. Venezuela*), 9 *U.N.R.I.A.A.* p. 494; *Bogovic* claim, ILR vol. 21, p. 156; *Executors of F. Lederer (deceased) v. German Government*.

character.[66] Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated.[67] The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

> "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

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[66] E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Low Publishing Co., 1915), p. 628; *Straub* claim.

[67] *Eschauzier* claim (*Great Britain v. Mexico*), at p. 209.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions[68] and codification endeavours,[69] the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

> "the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power."[70]

This rule has been followed in other cases[71] and has more recently been upheld by the Iran-United States Claim Tribunal.[72] The decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

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[68] See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 205 of 12 July 1926.

[69] See article 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its Warsaw Session in 1965: *Résolutions de l'Institut de Droit International*, 1957-1991 (1992), p. 56 (art. 4 (b)); 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, article 23 (3), in L.B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens", AJIL, vol. 55 (1961), p. 548; Garcia Amador, Third Report on State Responsibility, in *Yearbook ... 1958*, vol. II, p. 61, document A/CN.4/111 (art. 21 (3)).

[70] Award of 8 June 1932, UNRIAA vol. II, p. 1165 at p. 1188.

[71] See the decisions of the Italian-United States Conciliation Commission in the *Mergé* claim of 10 June 1955, ILR vol. 22 (1955), p. 443 at p. 456; the *Vereano* claim, decision No. 172 of 17 May 1957, ILR vol. 24 (1957), pp. 464-465; and the *Stankovic* claim of 26 July 1963, ILR vol. 40 (1963), p. 153 at p. 155.

[72] See *Dallal v. Iran*, Iran-U.S. C.T.R., vol. 3 (1983), p. 23.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[73]

Later codification proposals adopted a similar approach[74] and there was also support for this position in arbitral awards.[75] In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[76]

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.[77] This jurisprudence was relied on by the

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[73] See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL, vol. 23, Special Supplement (1929), pp. 133-139.

[74] See art. 23 (5) of the 1960 Harvard Draft Convention reproduced in AJIL, vol. 55 on the International Responsibility of States for Injuries to Aliens, reproduced in *AJIL*, vol. 55 (1961), p. 548; article 4 (a) of the resolution on "*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*" adopted by the Institute of International Law at its 1965 Warsaw Session.

[75] See *Alexander* case (1898) 3 Moore, *International Arbitrations*, p. 2529 (United States-British Claims Commission); *Oldenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97, *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13 (British-Mexican Claims Commission), cited in Z.R. Rode "Dual Nationals and the Doctrine of Dominant Nationality" AJIL, vol. 53 (1959), p. 139 at pp. 140-141; *Adams and Blackmore* case, decision No. 64 of 3 July 1931, UNRIAA vol. V, pp. 216-217 (British-Mexican Claims Commission).

[76] *I.C.J. Reports 1949*, p. 186.

[77] *James Louis Drummond* case 2 Knapp, P.C. Rep., p. 295, 12 Eng. Rep., p. 492; *Brignone, Milani, Stevenson* and *Mathinson* cases (British-Venezuelan Mixed Claim Commission) reported in Ralston, *Venezuelan Arbitrations of 1903*, pp. 710, 754-761, 438-455 and 429-438 respectively; *Carnevaro* case (Permanent Court of Arbitration, 1912) reported in Scott, *The Hague Court Reports*, vol. 1, at p. 284; *Hein* case of 26 April and 10 May 1922 (Anglo-German Mixed Arbitral Tribunal), *Annual Digest of Public International Law* cases, vol. 1, 1919-1922, case No. 148, p. 216; *Blumenthal* case (French-German Mixed Tribunal), *Recueil des Décisions des Tribunaux Mixtes*, vol. 3 (1924), p. 616; *de Montfort* case of 10 July 1926 (French-German Mixed Tribunal), *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 206, p. 279; *Pinson* case (French-Mexican Mixed Claims Commission), *Annual Digest of Public International Law Cases*, vol. 4, 1927-1928, case Nos. 194 and 195 of 19 October 1928, pp. 297-301; *Tellech* case of 25 May 1928 (United States-Austria and Hungary Tripartite Claim Commission), 6 UNRIAA, vol. VI, p. 248.

International Court of Justice in another context in the *Nottebohm* case[78] and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated that:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."[79]

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.[80] Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.[81] Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

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[78] *I.C.J. Reports 1955*, pp. 22-23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein in cases dealing with dual nationality. See also the judicial decisions referred to in footnote 65.

[79] ILR, vol. 22 (1955), p. 443 at p. 455 (para. V.5). See also *de Leon* case Nos. 218 and 227 of 15 May 1962 and 8 April 1963, UNRIAA, vol. XVI, p. 239 at p. 247.

[80] See, for example, *Spaulding* claim, decision No. 149, ILR, vol. 24 (1957), p. 452; *Zangrilli* claim of 21 December 1956, ILR, vol. 24 (1957), p. 454; *Cestra* claim, decision No. 165 of 28 February 1957, ILR, vol. 24 (1956), p. 454; *Puccini* claim, decision No. 173 of 17 May 1957, ILR, vol. 24 (1957), p. 454; *Salvoni Estate* claim, decision No. 169 of 9 May 1957, ILR, vol. 24 (1957), p. 455; *Ruspoli* claim, decision No. 170 of 15 May 1957, ILR, vol. 24 (1957), p. 457; *Ganapini* claim, decision No. 196 of 30 April 1959, ILR, vol. 30 (1959), p. 366; *Turri* claim, decision No. 209 of 14 June 1960, ILR, vol. 30 (1960), p. 371; *Graniero* claim, decision No. 186 of 20 January 1959, *ILR*, vol. 30 (1959), p. 451; *Di Cicio* claim, decision No. 226 of 9 November 1962, ILR, vol. 40 (1962), p. 148.

[81] See, in particular, *Esphahanian v. Bank Tejarat*, *Iran*-U.S.C.T.R., vol. 2 (1983), p. 166; case No. A/18, *Iran*-U.S.C.T.R, vol. 5 (1984), p. 251; *Ataollah Golpira v. Government of the Islamic Republic of Iran*, *Iran-U.S.C.T.R*, vol. 2 (1983), p. 174 and ILR, vol. 72, p. 493.

> **"In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[82]**

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.[83]

(4) Even though the two concepts are different the authorities use the term "effective" or "dominant" without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term "predominant" when applied to nationality than either "effective" or "dominant". It is moreover the term used by the Italian-United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.[84]

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

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[82] Document A/CN.4/111, in *Yearbook ... 1958*, vol. II, p. 61, draft art. 21, para. 4.

[83] "Interim Report on the 'The Changing Law of Nationality of Claims'" in *International Law Association (ILA) Report of the 69th Conference* (2000), pp. 646 (para. 11); confirmed in the final report adopted at the 2006 ILA Conference in Toronto.

[84] ILR, vol. 22 (1955), p. 455.

(6) Draft article 7 is framed in negative language: "A State of nationality may *not* exercise diplomatic protection … *unless*" its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases "at the date of injury" and "at the date of the official presentation of the claim" are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

> "A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."[85]

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961[86] and the Convention Relating to the Status of Refugees of 1951.[87]

(2) Draft article 8, an exercise in progressive development of the law,[88] departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954[89] which defines a stateless person "as a person

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[85] UNRIAA, vol. IV, p. 669 at p. 678.

[86] United Nations, *Treaty Series*, vol. 989, p. 175.

[87] *Ibid.*, vol. 189, p. 150.

[88] In *Al Rawi & Others, R (on the Application of) v. Secretary of State for Foreign Affairs* and *Another* [2006] EWHC (Admin) an English court held that draft article 8 was to be considered *lex ferenda* and "not yet part of international law" (para. 63).

[89] United Nations, *Treaty Series*, vol. 360, p. 117.

who is not considered as a national by any State under the operation of its law".[90] This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.[91] Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are "unable or unwilling to avail [themselves] of the protection of [the State of Nationality]"[92] and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons,[93] despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of "lawfully

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[90] Article 1.

[91] The terms "lawful and habitual" residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a "stateless person having his habitual residence in that State", article 21 (3) (c).

[92] Article 1 (A) (2) of the Convention Relating to the Status of Refugees.

[93] Habitual residence in this context connotes continuous residence.

staying"[94] for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.[95] Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*.[96]

(8) The term "refugee" in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term "recognized refugees", which appears in the 1997 European Convention on Nationality,[97] which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,[98] widely seen as the model for the international protection of refugees,[99] and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.[100] However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.[101] Such recognition must, however, be based on "internationally accepted standards" relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

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[94] The *travaux préparatoires* of the Convention make it clear that "stay" means less than habitual residence.

[95] See para. 16 of the Schedule to the Convention.

[96] See para. (4) of the commentary to this draft article.

[97] Article 6 (4) (g).

[98] United Nations, *Treaty Series*, vol. 1001, p. 45. This Convention extends the definition of refugee to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"

[99] Note on International Protection submitted by the United Nations High Commissioner for Refugees, document A/AC.96/830, p. 17, para. 35.

[100] O.A.S. General Assembly, XV Regular Session (1985).

[101] For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, *Treaty Series*, vol. 1438, p. 129.

(9) The temporal requirements for the bringing of a claim are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge "*may* exercise diplomatic protection". This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.[102] *A fortiori* it has a discretion whether to extend such protection to a stateless person or refugee.

(12) Draft article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Draft article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

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[102] See draft articles 2 and 19 and commentaries thereto.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

(3) As with natural persons, the granting of nationality to a corporation is "within the reserved domain" of a State.[103] As the International Court of Justice stated in the *Barcelona Traction* case:

> "… international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires

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[103] *Nationality Decrees issued in Tunis and Morocco case*

> that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."[104]

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in *Barcelona Traction* when it stated that international law "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office".[105] Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in *Barcelona Traction* was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a "genuine connection" as applied in the *Nottebohm* case,[106] and acknowledged that "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance,"[107] it suggested that in addition to incorporation and a registered office, there was a need for some "permanent and close connection" between the State exercising diplomatic protection and the corporation.[108] On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States of the Canadian nationality of the company.[109] All of this meant, said the Court, that "Barcelona Traction's links with Canada are thus manifold".[110] In *Barcelona Traction* the Court was not confronted with a situation in which a company was incorporated in one State but had a "close and permanent connection" with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

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[104] *Barcelona Traction* case, at pp. 33-34, para. 38.

[105] *Ibid.*, p. 42, para. 70.

[106] *Ibid.*, p. 42, para. 70. *Nottebohm* case.

[107] *I.C.J. Reports 1970*, p. 42, para. 70.

[108] *Ibid.*, p. 42, para. 71.

(4) Draft article 9 accepts the basic premise of *Barcelona Traction* that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

(5) Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

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[109] *Ibid.*, pp. 42-43, paras. 71-76.

[110] *Ibid.*, p. 42, para. 71.

(6) In *Barcelona Traction* the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which "could create an atmosphere of confusion and insecurity in international economic relations".[111] The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

Article 10

Continuous nationality of a corporation

> 1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
>
> 2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.
>
> 3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Commentary

(1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

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[111] *Ibid.*, p. 49, para. 96.

which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.[112] The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States.[113] In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to "predecessor State" in paragraph 1.

(4) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take.[114]

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[112] See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the *Orinoco Steamship Company Case*, UNRIAA, vol. IX., p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed; *ibid.*, at p. 192. See too *Loewen Group Inc v. U.S.A.*, at paragraph 220.

[113] See further on this subject the *Panevezys-Saldutiskis Railway* case, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document A/CN.4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

[114] See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the *Loewen* case[115] in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.[116]

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction* case[117] and it has troubled certain courts and arbitral tribunals[118] and scholars.[119] Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist - and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

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[115] *Op. cit.* at para. 220.

[116] Paragraphs (5) and (13).

[117] Judges Jessup, *I.C.J. Reports 1970*, at p. 193, Gros, *ibid.*, at p. 277, and Fitzmaurice, *ibid.*, at pp. 101-102, and Judge *ad hoc* Riphagen, *ibid.*, at p. 345.

[118] See the *Kunhardt and co.*, case (Opinions in the American-Venezuelan Commission of 1903), UNRIAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 180; *F.W. Flack, on behalf of the Estate of the Late D.L. Flack (Great Britain) v. United Mexican States*, decision No. 10 of 6 December 1929, UNRIAA, vol. V, p. 61 at p. 63.

[119] L. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public* (The Hague: Martinus Nijhoff Publishers, 1969), pp. 206-7; W.E. Beckett, "Diplomatic Claims in Respect of Injuries to Companies", *Transactions of the Grotus Society*, vol. 17 (1932), p. 158 at p. 191; E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990), pp. 197-202.

draft article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11

Protection of shareholders

> The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
>
> (*a*) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
>
> (*b*) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the *Barcelona Traction* case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in "a limited liability company whose capital is represented by shares".[120] Such companies are characterized by a clear distinction between company and shareholders.[121] Whenever a shareholder's interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for "although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed".[122] Only where the act complained of is aimed at the direct rights of the shareholders

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[120] *I.C.J. Reports 1970*, p. 34, para. 40.

[121] *Ibid.*, p. 34, para. 41.

[122] *Ibid.*, p. 35, para. 44.

does a shareholder have an independent right of action.[123] Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.[124]

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf.[125] Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities.[126] In this connection the Court indicated that if the shareholder's State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right.[127] Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.[128]

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation[129] - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality[130] - which was not the case with

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[123] *Ibid.*, p. 36, para. 47.

[124] *Ibid.*, p. 37, para. 50.

[125] *Ibid.*, p. 35, para. 43; p. 46, paras. 86-87; p. 50, para. 99.

[126] *Ibid.*, pp. 48-49, paras. 94-96.

[127] *Ibid.*, p. 48, paras. 94-95.

[128] *Ibid.*, p. 38, para. 53; p. 50, para. 98.

[129] *Ibid.*, pp. 40-41, paras. 65-68.

[130] *Ibid.*, p. 48, para. 92.

Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traction* because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

(4) Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including *Barcelona Traction*, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.[131]

(5) Draft article 11, paragraph (a) requires that the corporation shall have "ceased to exist" before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traction* case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was "practically defunct".[132] The Court in *Barcelona Traction*, however, set a higher threshold for determining the demise of a company. The "paralysis" or "precarious financial situation" of a company was dismissed as inadequate.[133] The test of "practically defunct" was likewise rejected as one "which lacks all legal precision".[134] Only the "company's status in law" was considered relevant. The Court stated: "Only in the event of the legal demise of the company are the shareholders

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[131] This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: "Rules Applying to International Claims" reproduced in document A/CN.4/561/Add.1, Annex.

[132] *Delagoa Bay Railway Co.* case, B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 648; *El Triunfo* claim; B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 649; *Baasch & Romer* case, Netherlands-Venezuelan Mixed Commission, 28 February 1903, UNRIAA, vol. X, p. 713 at p. 723.

[133] *I.C.J. Reports 1970*, pp. 40-41, paras. 65 and 66.

[134] *Ibid.*, p. 41, para. 66.

deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise."[135] Subsequent support has been given to this test by the European Court of Human Rights.[136]

(6) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in *the place of incorporation* as a precondition to shareholders' intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain[137] but emphasized that this did not affect its continued existence in Canada, the State of incorporation: "In the present case, the *Barcelona Traction* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist."[138] A company is "born" in the State of incorporation when it is formed or incorporated there. Conversely, it "dies" when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

(7) The final phrase "for a reason unrelated to the injury" aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation's demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation

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[135] *Ibid.*, see also, the separate opinions of Judges Nervo, *ibid.*, p. 256 and Ammoun, *ibid.*, pp. 319-320.

[136] *Agrotexim* case, ECHR., *Series A* (1995), No. 330-A, p. 25, para. 68.

[137] *I.C.J. Reports 1970*, p. 40, para. 65. See too the separate opinions of Judges Fitzmaurice, *ibid.*, p. 75 and Jessup, *ibid.*, p. 194.

[138] *Ibid.*, p. 41, para. 67.

unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(8) Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(9) There is support for such an exception in State practice, arbitral awards[139] and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway*,[140] *Mexican Eagle*[141] and *El Triunfo*.[142] While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

> "If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic

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[139] *Delagoa Bay Railway Company*; *Mexican Eagle* (*El Aguila*), M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1272-1274; *Romano-Americano*, Hackworth, *Digest of International Law*, vol. V, p. 841; *El Triunfo* award of 8 May 1902, UNRIAA, vol. XV, p. 467; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* award of 5 August 1926, UNRIAA, vol. II, p. 779 at p. 790. For a comprehensive examination of the authorities, see L. Caflisch, *La protection des sociétés commerciales ... op. cit*; M. Jones, "Claims on Behalf of Nationals who are Shareholders in Foreign Companies", BYBIL, vol. 26 (1949), p. 225. See, too, E. Jiménez de Aréchaga "International Responsibility", in Max Sørensen (ed.), *Manual of International Law* (New York: St. Martin's Press, 1968), p. 531 at pp. 580-581.

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid.*

> intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad."[143]

(10) In *Barcelona Traction*, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

> "It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction."[144]

Judges Fitzmaurice,[145] Tanaka[146] and Jessup[147] expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.[148]

While both Fitzmaurice[149] and Jessup[150] conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,[151] Morelli[152] and Ammoun,[153] on the other hand, were vigorously opposed to the exception.

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[143] M. Whiteman, *Digest of International Law*, vol. 8 (Washington D.C.: USA Department of State, 1967), pp. 1273-1274.

[144] *I.C.J. Reports 1970*, p. 48, para. 92.

[145] *Ibid.*, pp. 72-75.

[146] *Ibid.*, p. 134.

[147] *Ibid.*, pp. 191-193.

[148] Judge Wellington Koo likewise supported this position in the *Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 58, para. 20.

[149] *I.C.J. Reports 1970*, p. 73, paras. 15 and 16.

[150] *Ibid.*, pp. 191-192.

(11) Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.[154] In the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*[155] a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* or on the proposed exception left open in *Barcelona Traction* despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.[156] This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.[157] It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a

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[151] *Ibid.*, pp. 257-259.

[152] *Ibid.*, pp. 240-241.

[153] *Ibid.*, p. 318.

[154] See *SEDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* case No. 129, of 24 October 1985, ILR, vol. 84, pp. 484, 496 (interpreting article VII (2) of the Algiers Claims Settlement Declaration); *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia* ICSID Reports, vol. 2 (1994), p. 346 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 575, p. 159).

[155] *I.C.J. Reports*, 1989, p. 15.

[156] *Ibid.*, pp. 64 (para. 106), 79 (para. 132).

[157] This is clear from an exchange of opinions between Judges Oda, *ibid.*, pp. 87-88 and Schwebel, *ibid.*, p. 94 on the subject.

corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.[158]

(12) Before *Barcelona Traction* there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.[159] The *obiter dictum* in *Barcelona Traction* and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.[160] In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a "Calvo corporation", a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being "required" to incorporate in that State.

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[158] This view is expressed by Yoram Dinstein in "Diplomatic Protection of Companies under International Law", in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff Publishers, 1998), p. 505 at p. 512.

[159] See the submission to this effect by the United States in A/CN.4/561, pp. 34-35.

[160] According to the United Kingdom's 1985 Rules Applying to International Claims, "where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty's Government may intervene to protect the interests of the United Kingdom national" (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/561/Add.1, Annex.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in *Barcelona Traction* when it stated:

> "... an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action."[161]

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the *ELSI* case.[162] However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international

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[161] *I.C.J. Reports 1970*, p. 36, paras. 46-47.

[162] *I.C.J. Reports 1989*, p. 15.

law on this subject. In *Agrotexim*,[163] the European Court of Human Rights, like the Court in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.[164]

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In *Barcelona Traction* the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders' rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases "the rights of the shareholders as such" and rights "as distinct from those of the corporation itself".

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.[165]

Article 13

Other legal persons

> The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

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[163] *Series A*, No. 330-A.

[164] *Ibid.*, p. 23, para. 62.

[165] In his separate opinion in *ELSI*, Judge Oda spoke of "the general principles of law concerning companies" in the context of shareholders' rights; *I.C.J. Reports 1989*, at pp. 87-88.

Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, "person" is a human being. In the legal sense, however, a "person" is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes,

without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice[166] and the International Court of Justice.[167]

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune[168] (municipality) or university[169] may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.[170] Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

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[166] *The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust ECJ*, Case 81/87 [1988] ECR 5483, at para. 19.

[167] *Barcelona Traction* Case (Judgment), at pp. 34-35, para. 38.

[168] In *Certain German Interests in Polish Upper Silesia* case (Merits) the Permanent Court held that the commune of Ratibor fell within the category of "German national" within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, *P.C.I.J. Reports, Series A*, No. 7, pp. 73-75.

[169] In *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University v. The State of Czechoslovakia* Judgment) the Permanent Court held that the Peter Pázmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, *P.C.I.J. Reports, Series A/B*, No. 61, pp. 208, 227-232.

[170] As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.

probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations.[171]

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be "appropriate" to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it.[172]

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

> 1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
>
> 2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

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[171] See, further, K. Doehring, "Diplomatic Protection of Non-Governmental Organizations", in M. Rama-Montaldo (ed), *El derecho internacional en un mundo en transformación: liber amicorum: en homenaje al professor Eduardo Jiménez de Aréchaga* (Montevideo: fundaciöndecuitwa universitaria, 1994), pp. 571-580.

[172] This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"[173] and by a Chamber of the International Court in the *Elettronica Sicula (ELSI)* case as "an important principle of customary international law".[174] The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[175] The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.[176]

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase "all local remedies" must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

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[173] *Interhandel* case (*Switzerland v. United States of America*) Preliminary objections, *I.C.J. Reports 1959*, p. 6 at p. 27.

[174] *I.C.J. Reports 1989*, p. 15 at p. 42, para. 50.

[175] *Interhandel* case, at p. 27.

[176] Article 22 on First Reading, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.1), chap. III D 1; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50; commentary to art. 44 on Second Reading, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) pp. 304-307.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.[177] In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.[178] Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".[179]

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose "purpose is to obtain a favour and not to vindicate a right"[180] nor do they include remedies of grace[181] unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.[182]

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[177] In the *Ambatielos Claim* of 6 March 1956 the arbitral tribunal declared that "[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test", UNRIAA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

[178] This would include the *certiorari* process before the United States Supreme Court.

[179] *B. Schouw Nielsen v. Denmark*, Application No. 343/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 412 at p. 438 (referring to the views of the Institute of International Law in its resolution of 1954 (*Annuaire*, 1956, vol. 46, p. 364)). See also *Lawless* case, Application No. 332/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 308 at pp. 318-322.

[180] *De Becker v. Belgium*, Application No. 214/56, 1958-1959, *Yearbook of the European Convention on Human Rights*, vol. 2, p. 214 at 238.

[181] Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War ("*Finnish Ships Arbitration*") 1934, UNRIAA, vol. III, p. 1479.

[182] See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

> "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[183]

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

> "all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts".[184]

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies.[185] The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.[186]

(8) Draft article 14 does not take cognizance of the "Calvo Clause",[187] a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States[188] on the ground that the alien has no right, in accordance with the rule in *Mavrommatis*, to waive a right that belongs to the State and not its national. Despite this, the "Calvo Clause" was viewed as a regional custom

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[183] *I.C.J. Reports 1989*, p. 15 at para. 59.

[184] UNRIAA, vol. III., at p. 1502.

[185] *Ambatielos Claim*, at p. 120.

[186] D.P. O'Connell, *International Law*, vol. 2 (London: Stevens and Sons, 1970), p. 1059.

[187] Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).

[188] See, generally, D.R. Shea *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

in Latin-America and formed part of the national identity of many States. The "Calvo Clause" is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.[189] The objection to the validity of the "Calvo Clause" in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State.[190]

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.[191]

(10) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the International Court of Justice have presented the phenomenon of the mixed claim. In the *Hostages* case,[192] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case, there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies. In the *Arrest Warrant of 11 August 2000* case there was a direct injury to the Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court held that the claim was not brought within the context of the protection of a national so it was

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[189] *North American Dredging Company (U.S.A. v. Mexico)*, UNRIAA, vol. IV, p. 26.

[190] See paragraph (5) of commentary to draft article 1.

[191] See generally on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 145-168.

[192] *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, *I.C.J. Reports 1980*, p. 3.

not necessary for the DRC to exhaust local remedies.[193] In the *Avena* case Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had "itself suffered, directly and through its nationals" as a result of the United States' failure to grant consular access to its nationals under article 36 (1) of the Convention. The Court upheld this argument because of the "interdependence of the rights of the State and individual rights".[194]

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

> "the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]".[195]

Closely related to the preponderance test is the *sine qua non* or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances one test only is provided for in paragraph 3, that of preponderance.

(12) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment

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[193] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3 at p. 18, para. 40.

[194] *I.C.J. Reports 2004*, p. 12, para. 40.

[195] *I.C.J. Reports 1989*, p. 15 at p. 43, para. 52. See, also, the *Interhandel* case, *I.C.J. Reports 1959*, at p. 28.

are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,[196] diplomatic official[197] or State property[198] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,[199] there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.[200]

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.[201]

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

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[196] *Arrest Warrant of 11 August 2000, I.C.J. Reports 2000*, p. 3, para. 40.

[197] *Hostages* case, *I.C.J. Reports 1980*, p. 3.

[198] The *Corfu Channel* case (*United Kingdom v. Albania*) Merits, *I.C.J. Reports 1949*, p. 4.

[199] *Case concerning* the *Air Services Agreement* of 27 March 1946 between the United States of America and France, decision of 9 December 1978, UNRIAA, vol. XVIII, p. 415; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, of 26 June 1947, Advisory Opinion, *I.C.J. Reports 1988*, p. 11 at p. 29, para. 41.

[200] See *The Interhandel*, at pp. 28-29; *ELSI* case, at p. 43.

[201] See *ELSI* case, at 46, para. 59.

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(*d*) The injured person is manifestly precluded from pursuing local remedies; or

(*e*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

(1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (e) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph (a)

(2) Paragraph (*a*) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "futility" or "ineffectiveness" exception. Three options require consideration for the formulation of a rule describing the circumstances in which local remedies need not be exhausted because of failures in the administration of justice:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

(3) The "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*, sets too high a threshold. On the other hand, the test of "no reasonable prospect of

success", accepted by the European Commission of Human Rights in several decisions,[202] is too generous to the claimant. This leaves the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[203] and is supported by the writings of jurists.[204] The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts[205] and is sometimes considered as a component of this rule by courts[206] and writers.[207] For this reason the test in paragraph (a) is expanded to require that there are no "reasonably available local remedies" to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[208] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[209] the local courts are notoriously lacking in independence;[210] there is a consistent and well-established line of precedents adverse to the alien;[211] the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;[212] or the respondent State does not have an adequate system of judicial protection.[213]

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[202] *Retimag S.A. v. Federal Republic of Germany*, Application No. 712/60, *Yearbook of the European Convention on Human Rights*, vol. 4, p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, *European Commission of Human Rights, Decisions and Reports*, vol. 18, p. 66 at p. 74. See, too, the commentary to art. 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook ... 1977*, vol. II (Part Two), para. 48.

[203] *Case of certain Norwegian Loans (France v. Norway)*, Judgment, *I.C.J. Reports 1957*, at p. 39.

[204] G. Fitzmaurice "Hersch Lauterpacht - The Scholar a Judge", BYBIL, vol. 37 (1961), p. 1 at pp. 60-61; M. Herdegen, "Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen" in G. Ress and T. Stein, *Der diplomatische Schutz im Völker - und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1966), p. 63 at P. 70.

[205] Article 44 requires local remedies to be "available and effective".

[206] In *Loewen Group Inc v. USA*, the tribunal stated that the exhaustion of local remedies rule obliges the injured person "to exhaust remedies which are effective and adequate and are reasonably available" to him (at para. 168).

[207] C.F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 181-2, 203-4.

[208] *Panevezys-Saldutiskis Railway* case, at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in AJIL, vol.28. (1934), p. 760 at p. 789; Claims of R. Gelbtrunk and "Salvador Commercial Co." *et al.*, UNRIAA, vol. XV, p. 467 at pp. 476-477; *"The Lottie May" Incident*, Arbitration between Honduras and the United Kingdom, of 18 April 1899, UNRIAA, vol. XV, p. 29 at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case, *I.C.J. Reports 1957*, at pp. 39-40; *Finnish Ships Arbitration*, UNRIAA, vol. III, p. 1535.

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.[214]

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

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[209] *Arbitration under Article 181 of the Treaty of Neuilly*, AJIL, vol. 28 (1934), p. 789. See also *Affaire des Forêts du Rhodope Central (Fond)* 1933, UNRIAA, vol. III, p. 1405; *Ambatielos* claim, UNRIAA, vol XII, p. 119; *Interhandel* case, *I.C.J. Reports 1959*, at p. 28.

[210] *Robert E. Brown Claim* of 23 November 1923, UNRIAA, vol. VI, p. 120; *Vélasquez Rodríguez* case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.

[211] *Panevezys-Saldutiskis Railway* case, at p. 18; *S.S. "Lisman"*, UNRIAA, vol. III, p. 1769 at p. 1773; *S.S. "Seguranca"*, UNRIAA, vol. III, p. 1861 at p. 1868; *Finnish Ships Arbitration*, at p. 1495; *X. v. Federal Republic of Germany*, 1956, *Yearbook of the European Convention on Human Rights*, vol. I, p. 138; *X. v. Federal Republic of Germany*, *Yearbook of the European Convention on Human Rights*, vol 2, p. 342 at p. 344; *X. v. Austria*, *Yearbook of the European Convention on Human Rights*, vol. 3, p. 196 at p. 202.

[212] *Finnish Ships Arbitration*, at pp. 1496-1497, *Vélasquez Rodríguez* case; *Yağci and Sargin v. Turkey*, Judgment of 8 June 1995, *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornsby v. Greece*, Judgment of 19 March 1997, *European Court of Human Rights, Reports and Decisions*, 1997-11, No. 33, p. 495 at p. 509, para. 37.

[213] *Mushikiwabo and others v. Barayagwiza*, 9 April 1996, ILR, vol. 107, p. 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies, resolution 1a/88, case 9755, *Ann.Rep Int. Am. Com HR* 1987/88.

[214] *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at pp. 119-120.

to be implemented is confirmed by codification attempts,[215] human rights instruments and practice,[216] judicial decisions[217] and scholarly opinion. It is difficult to give an objective content or meaning to "undue delay", or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

> "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter."[218]

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase "remedial process" is preferred to that of "local remedies" as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in draft article 15, paragraph (a), to the effect that local remedies do not need to be exhausted where they are not reasonably available or "provide no reasonable possibility of effective redress", does not cover situations where local remedies are available and might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be

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[215] See the discussion of early codifications attempts by *F.V. Garcia-Amador* in First Report, *Yearbook … 1956*, vol. II, p. 173 at 223-226; art. 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in AJIL, vol. 55 (1961), p. 545 at p. 577.

[216] International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, article (1) (c)); American Convention on Human Rights (article 46 (2) (c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57 at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdoğan v. Turkey*, Application No. 19807/92, No. 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5 at p. 15.

[217] *El Oro Mining and Railway Company (Limited) (Great Britain v. United Mexican States)*, decision No. 55 of 18 June 1931, UNRIAA, vol. V, p. 191 at p. 198. See also *Case concerning the Administration of the Prince von Pless*, Preliminary objections, *P.C.I.J. Series A/B*, 1933, No. 52, p. 4.

[218] *Ibid.*, at p. 198.

unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State's territory. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.[219] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in

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[219] See Amerasinghe, *Local Remedies in International Law*, p. 169; T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", BYBIL, vol. 35, 1959, p. 83 at p. 94.

support of the existence of such an exception in the *Interhandel*[220] and *Salem*[221] cases, in other cases[222] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[223] and the *Aerial Incident* case (*Israel v. Bulgaria*)[224] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,[225] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[226] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term "voluntary link" to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a "relevant connection" between the injured alien and the host State and not a voluntary link. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the

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[220] Here the International Court stated: "it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means". *I.C.J. Reports 1959*, at p. 27. Emphasis added.

[221] In the *Salem* case an arbitral tribunal declared that "[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence". UNRIAA, vol. II, p. 1165 at p. 1202.

[222] *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at p. 99.

[223] *Case of certain Norwegian Loans (France v. Norway)*, Oral Pleadings of France, *I.C.J. Pleadings 1957*, vol. I, p. 408.

[224] *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)* (Preliminary objections), Oral Pleadings of Israel, *I.C.J. Pleadings 1959*, pp. 531-532.

[225] UNRIAA, vol. III, p. 1905.

[226] *Virginius* case, reported in J.B. Moore, *A Digest of International Law*, vol. 2 (1906), p. 895 at p. 903; *Jessie* case, reported in AJIL, vol. 16 (1922), pp. 114-116.

injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant" best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no "relevant connection" between the injured individual and the respondent State at the date of the injury.

Paragraph (d)

(11) Paragraph (d) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is "manifestly" precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and "manifestly preclude" compliance with the exhaustion of local remedies rule.[227]

Paragraph (e)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

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[227] On the implications of costs for the exhaustion of local remedies, see *Loewen Group Inc. v. United States of America*, at para. 166.

follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly."[228]

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an *ad hoc* arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

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[228] *Government of Costa Rica* case (In the matter of Viviana Gallardo *et al.*) of 13 November 1981, Inter-American Court of Human Rights, ILR, vol. 67, p. 578 at p. 587, para. 26. See also ILM, vol. 20 (1981), p. 1057. See also *ELSI* case, ILR, vol. 67, at p. 42, para. 50; *De Wilde, Ooms and Versyp* cases ("Belgian Vagrancy Cases"), European Court of Human Rights, 1971, ILR, vol. 56, p. 337 at p. 370, para. 55.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.[229]

(16) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

> "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[230]

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[231] and the writings of jurists[232]support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[233] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.[234] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

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[229] *Government of Costa Rica* case, at p. 587, para. 26; "Belgian Vagrancy cases", at p. 370, para. 55.

[230] *I.C.J. Reports 1989*, at p. 42, para. 50.

[231] See, for example, *Steiner and Gross v. Polish State 30 March 1928*, 1927-1928, *Annual Digest of Public International Law Cases*, vol. 4, p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3, *Iran-U.S.-C.T.R.*, vol. IV (1983), p. 96.

[232] See, for example, S. Schwebel *International Arbitration: Three Salient Problems* (Cambridge: Grotius Publishers, 1987), pp. 117-121.

[233] F.A. Mann, "State contracts and international arbitration", BYBIL, vol. 42 (1967), p. 1 at p. 32.

[234] *I.C.J. Reports 1989*, p. 15. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, *P.C.I.J. Series A/B*, 1939, No. 76, p.19 (as had been argued by Judge van Eysinga in a dissenting opinion, *ibid.*, pp. 35-36).

State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,[235] paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

> The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

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[235] See *ELSI* case, at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* award of 30 November 1992 (Arbitration Tribunal), ILR, vol. 102, p. 216 at p. 285, para. 6.33; *Foti and others*, Judgment of 10 December 1982, Merits, ILR, vol. 71, p. 366 at p. 380, para. 46.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,[236] the International Convention on the Elimination of All Forms of Racial Discrimination,[237] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[238] the European Convention on Human Rights,[239] the American Convention on Human Rights,[240] and the African Charter on Human and People's Rights.[241] The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 *South West Africa* cases[242] holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.[243] Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,[244] without complying with the requirements for the exercise of diplomatic protection.[245]

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual's State of nationality or another State, in terms of

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[236] United Nations, *Treaty Series*, vol. 999, p. 171, art. 41.

[237] Article 11.

[238] United Nations, *Treaty Series*, vol. 1465, p. 85, art. 21.

[239] Article 24.

[240] Article 45.

[241] United Nations, *Treaty Series*, vol. 1520, p. 217, arts. 47-54.

[242] *Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6.

[243] Commentary to article 48, footnote 766.

[244] See further the separate opinion of Judge Simma in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *I.C.J. Reports 2005*, paras. 35-41.

[245] Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milano "Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition", *Netherlands Yearbook of International Law*, vol. 35 (2005), p. 85 at pp. 103-108).

international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.[246]

(4) Individual rights under international law may also arise outside the framework of human rights. In the *La Grand* case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person";[247] and in the *Avena* case the Court further observed "that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual".[248] A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.[249]

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term "legal person" including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be "other legal entities" not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims' associations

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[246] See, for example, the Optional Protocol to the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; articles 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465, p. 85; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 2131, p. 83.

[247] *La Grand (Germany v. United States of America)*, at p. 494, para. 77.

[248] *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, at p. 26, para. 40.

[249] This article reads: "This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State".

provide an example of such "another entity" which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

Article 17

Special rules of international law

> The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Commentary

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs).[250] The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established

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[250] This was acknowledged by the International Court of Justice in the *Barcelona Trcction* case, at p. 47, para. 90.

by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.[251]

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply "*to the extent that*" they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

(4) Draft article 17 refers to "treaty provisions" rather than to "treaties" as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

Article 18

Protection of ships' crews

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

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[251] Article 27 (1) of the ICSID Convention provides: "No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

Commentary

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship's crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,[252] for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.[253] This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic

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[252] H. Myers, *The Nationality of Ships* (1967), pp. 90-108; R. Dolzer, "Diplomatic Protection of Foreign Nationals" in *Encyclopaedia of Public International Law* (1992), vol. 1, p. 1068; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press 2003), p. 460.

[253] *Ross v. McIntyre*, 140 U.S. 453 (1891).

communications and consular regulations of the United States.[254] Doubts have, however, been raised, including by the United States,[255] as to whether this practice provides evidence of a customary rule.[256]

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that "seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve".[257] In the "*I'm Alone*" case,[258] which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.[259]

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V "Saiga" (No. 2)* case (*Saint Vincent and the Grenadines v. Guinea*)[260] which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines ("St. Vincent") and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent's claim, *inter alia*, on the ground

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[254] G.H. Hackworth, *Digest of International Law* (1942), vol. 3, p. 418, vol. 4, pp. 883-884.

[255] Communication dated 20 May 2003 to the International Law Commission (on file with the Codification Division of the Office of Legal Affairs of the United Nations).

[256] See Arthur Watts, "The Protection of Alien Seamen", ICLQ vol. 7 (1958), p. 691.

[257] J.B. Moore, *International Arbitrations*, vol. 3, p. 2536.

[258] AJIL vol. 29 (1935), 326.

[259] *I.C.J. Reports 1949*, p. 174 at pp. 202-203, Judge Hackworth and pp. 206-207, Judge Badawi Pasha.

[260] Judgment, *ITLOS Reports 1999*, p. 10.

that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,[261] the Tribunal's reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.[262] St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[263] In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea[264] in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.[265] It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[266]

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship's crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships "could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue".[267] Practical considerations relating to the bringing of claims should not be

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[261] *Ibid.*, para. 98.

[262] *Ibid.*, para. 103.

[263] *Ibid.*, para. 104.

[264] United Nations, *Treaty Series*, vol. 1833, p. 3.

[265] Judgment, *ITLOS Reports 1999*, para. 105.

[266] *Ibid.*, para. 106.

[267] *Ibid.*, para. 107.

overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship's crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.

Article 19

Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(*a*) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(*b*) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(*c*) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Commentary

(1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to

transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States "should" follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties.[268]

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.[269] This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

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[268] Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, "the Security Council *should* also take into consideration that legal disputes *should* as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court" (emphasis added). Conventions on the law of the sea also employ the term "should" rather than "shall". Article 3 of the 1958 Geneva Convention on the High Seas, United Nations, *Treaty Series*, vol. 450, p. 11, provides that "in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast *should* have free access to the sea" (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

[269] A/RES/60/1, paras. 119-120, 138-140.

another State. The discretionary nature of the State's right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice[270] and national courts,[271] as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad,[272] which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.[273] In *Kaunda and Others v. President of the Republic of South Africa* the South Africa Constitutional Court stated that:

> "There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action."[274]

In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.

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[270] *Barcelona Traction* case, at p. 44.

[271] See, for example, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM, vol. 44 (2005), p. 173.

[272] See First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, p. 30.

[273] *Rudolf Hess* case ILR vol. 90 p. 387 at pp. 392, 396; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598 and ILR vol. 125 p. 685, paras. 69, 79, 80, 82-83, 107-8. See, generally, A. Vermeer-Künzli "Restricting Discretion: Judicial Review of Diplomatic Protection" *Nordic Journal of International Law* vol. 75 (2006), p.93.

[274] 2005 (4) South African Law Reports 235 (CC); ILM vol. 44 (2005), p. 173, para. 69.

(4) Subparagraph (b), provides that a State "should", in the exercise of diplomatic protection, "take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought". In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed.[275] In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law.[276] If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

(5) Subparagraph (c) provides that States should transfer any compensation received from the responsible State in respect of an injury to a national to the injured national. This recommendation is designed to encourage the widespread perception that States have an absolute discretion in such matters and are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national. This perception has its roots in the *Mavrommatis* rule and a number of judicial pronouncements. In terms of the *Mavrommatis Palestine Concessions* dictum a State asserts its own right in exercising diplomatic protection and becomes "the sole claimant".[277] Consequently, logic dictates that no restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. That the State has "complete freedom of action" in its exercise of diplomatic protection is confirmed by the *Barcelona Traction* case.[278] Despite the fact that the logic of *Mavrommatis* is undermined by the practice of calculating the amount of damages

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[275] *Chorzow Factory* case (*Merits*), *P.C.I.J. Reports*, Series A, No. 17, p. 28; separate opinion of Judge Morelli in *Barcelona Traction* case, *I.C.J. Reports 1970*, p. 223.

[276] B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale* (Paris: A. Pedone, 1973), p. 98; L. Dubois "La distinction entre le droit de l'État réclamant et le droit au ressortissant dans la protection diplomatique" *Revue critique de Droit International Privé*, (1978) pp. 615, 624.

[277] *P.C.I.J. Reports 1924*, Series A, No. 2, p. 2.

[278] *I.C.J. Reports 1970*, p. 3 at p. 44.

claimed on the basis of the injury suffered by the individual,[279] which is claimed to be a rule of customary international law,[280] the view persists that the State has an absolute discretion in the disposal of compensation received. This is illustrated by the dictum of Umpire Parker in the US-German Mixed Claims Commission in *Administrative Decision V*:

> "In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. *Even if payment is made to the espousing nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.*"[281]

Similar statements are to be found in a number of English judicial decisions,[282] which are seen by some to be an accurate statement of international law.[283]

(6) It is by no means clear that State practice accords with the above view. On the one hand, States agree to lump sum settlements in respect of multiple individual claims which in practice result in individual claims receiving considerably less than was claimed.[284] On the other hand, some States have enacted legislation to ensure that compensation awards are fairly distributed to

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[279] *Chorzow Factory* case (Merits) *P.C.I.J. Reports 1928*, Series A, No. 17, at p. 28.

[280] See the authors cited in footnote 276 above.

[281] UNRIAA vol. VII., p. 119 at p. 152 (Emphasis added).

[282] *Civilian War Claimants Association v. R* [1932] AC p. 14; *Lonrho Exports Ltd. v. Export Credits Guarantee Department* [1996] 4 All E.R., p. 673; at p. 687.

[283] American Law Institute, *Restatement of the Law*, Third, Foreign Law of the United States (1987) at §902, pp. 348-9; *Distribution of the Aslop Award*, Opinion of J. Reuben Clark, Department of State, cited in Hackworth, *Digest of International Law*, vol. 5, p. 766; B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 108.

[284] W.K. Geck "Diplomatic Protection" in *Encyclopaedia of Public International Law* (1992), vol. 1 at p. 1058; D. Bederman "Interim Report on 'Lump Sum Agreements and Diplomatic Protection'" International Law Association, Report of the Seventieth Conference, New Delhi (2002), p. 230; R. Lillich "The United States-Hungarian Claims Agreement of 1973" (1975), AJIL vol. 69, p. 534; R. Lillich & B. Weston *International Claims: Their Settlement by Lump-Sum Agreements* (Charlottesville: University Press of Virginia 1975).

individual claimants. Moreover, there is clear evidence that in practice States do pay moneys received in diplomatic claims to their injured nationals. In *Administrative Decision V*, Umpire Parker stated:

> "... But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. It is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held 'in trust for citizens of the United States or others'".[285]

That this is the practice of States is confirmed by scholars.[286] Further evidence of the erosion of the State's discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided.[287] Moreover in 1994 the European Court of Human Rights decided in *Beaumartin v. France*[288] that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

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[285] UNRIAA, vol. VII, p. 119, at p. 152.

[286] W.K. Geck "Diplomatic Protection" in *Encyclopedia of Public International Law* (1992), vol. 1 at p. 1057; F.V. Garcia-Amador, Louis B. Sohn & R.R. Baxter, *Recent Codification of the Law of the State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y.: Oceana Publishers, 1974), p. 151.

[287] See B. Bollecker-Stern, *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 109.

[288] Case No. 15287/89; [1994] ECHR 40.

(7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.

(8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

51. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter, Special Rapporteur.[289]

52. From the thirty-second (1980) to the thirty-sixth (1984) sessions, the Commission received and considered five reports from the Special Rapporteur. In the fifth report, five draft articles were proposed by the Special Rapporteur but no decision was made to refer them to the Drafting Committee.[290]

53. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic and from its thirty-seventh (1985) to the forty-eighth (1996)

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[289] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[290] For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2 (First report); *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2 (Second report); *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360 (Third report); *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373 (Fourth report); *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1 (Fifth report). The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report (1982). In 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline. *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378 and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471.

sessions it received and considered 12 reports from the Special Rapporteur.[291] During this period, the Commission also established two working groups, one in 1992 to consider general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic[292] and the other in 1996 to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and to make recommendations to the Commission. The report of the latter Working Group provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.[293]

54. At its forty-ninth (1997) session, the Commission, on the basis of recommendations of a Working Group established to consider how the Commission should proceed with its work on this topic[294] decided to deal first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities" and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.[295] From its fiftieth (1998) to its fifty-second (2000) sessions, the Commission received and considered three reports from the Special Rapporteur.[296]

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[291] For the 12 reports of the Special Rapporteur, see: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394 (First report); *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402 (Second report); *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405 (Third report); *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413 (Fourth report); *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423 (Fifth report); *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 (Sixth report); *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437 (Seventh report), *Yearbook ... 1992*, vol. II (Part One), p. 75, document A/CN.4/443 (Eighth report), *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450 (Ninth report) *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459 (Tenth report); document A/CN.4/468 (Eleventh report); and document A/CN.4/475 and Add.1 (Twelfth report).

[292] *Yearbook ... 1992*, vol. II (Part Two), para. 281. On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting, on 8 July 1992, decided to continue the work on this topic in stages: first completing work on prevention of transboundary harm and subsequently proceeding with remedial measures. The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title, *ibid.*, paras. 341-349. For a detailed recommendation of the Commission see *ibid.*, ... 1995, chap. V.

[293] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/51/10), Annex.

[294] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), paras. 162-165.

[295] *Ibid.*, para. 168. The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

[296] A/CN.4/487 and Add.1 (First report); A/CN.4/501 (Second report) and A/CN.4/510 (Third Report). The Commission also had before it comments and observations from Governments, A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

55. At its fiftieth session (1998), the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities[297] and at its fifty-third session (2001), it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,[298] thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

56. At its fifty-fourth session (2002), the Commission resumed its consideration of the second part of the topic and upon the recommendation of a Working Group established to consider the conceptual outline of the topic,[299] appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic under the subtitle "International liability in the case of loss from transboundary harm arising out of hazardous activities".[300]

57. Between the fifty-fifth (2003) and the fifty-sixth (2004) sessions, the Commission received and considered two reports of the Special Rapporteur.[301] During this period, the Commission also established two working groups, one in 2003 to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission and the other in 2004 to examine the proposals submitted by the Special Rapporteur, taking into account the debate in the Commission, with a view to recommending draft principles ripe for referral to the Drafting Committee, while also continuing discussions on other issues, including the form that work on the topic should take. At its 2815th meeting,

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[297] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 52.

[298] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

[299] The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

[300] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 441. The report of the Working Group set out some initial understandings on the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)", presented views on its scope and the approaches to be pursued.

[301] A/CN.4/531 (First report) and A/CN.4/540 (Second report).

on 9 July 2004, the Commission received the oral report of the Chairman of the Working Group and decided to refer eight draft principles proposed by the Working Group to the Drafting Committee with a request to also prepare a text of a preamble.

58. At the same fifty-sixth session (2004), the Commission completed on first reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and decided, in accordance with articles 16 and 21 of its statute to transmit the draft principles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

B. Consideration of the topic at the present session

59. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/566). The Commission also had before it comments and observations received from Governments (A/CN.4/562 and Add.1). The Commission considered the report at its 2872nd to 2875th meetings, on 9, 10, 11 and 12 May 2006, and at the latter meeting decided to refer the draft principles adopted in 2004, on first reading, to the Drafting Committee for a second reading taking into account the views expressed in the Commission and comments and observations received from Governments.

60. At its 2882nd meeting, on 2 June 2006, the Commission received and considered the report of the Drafting Committee (A/CN.4/L.686) and adopted on second reading the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

61. At its 2909th and 2910th meetings, on 8 August 2006 the Commission adopted the commentaries to the aforementioned draft principles.

62. In accordance with its Statute, the Commission submits the draft preamble and the draft principles to the General Assembly, together with a recommendation set out below.

C. Recommendation of the Commission

63. At its 2910th meeting on 8 August 2006, the Commission recalled that at its forty-ninth session (1997) it decided to consider the topic in two parts; at its fifty-third session (2001) it

completed the first part[302] and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on Prevention of transboundary harm from hazardous activities.[303] The Commission's recommendation was based on its view that, taking into account the existing State practice, the first part of the topic lent itself to codification and progressive development through a convention. The adoption by the Commission of the draft principles on the Allocation of loss in the case of transboundary harm arising out of hazardous activities completes the second part, thus concluding work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law". In accordance with article 23 of its Statute the Commission recommends, for this second part, that the Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them.

D. Tribute to the Special Rapporteur

64. At its 2910th meeting, on 8 August 2006, the Commission, following the adoption of the text of the preamble and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having adopted* the draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,
>
> *Expresses* to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft preamble and draft principles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft preamble and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities."

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[302] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 91.

[303] *Ibid*., paras. 94 and 97.

65. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Mr. Robert Q. Quentin-Baxter and Mr. Julio Barboza, for their outstanding contribution to the work on the topic.

E. Text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

1. Text of the draft principles

66. The text of the draft principles adopted by the Commission at its fifty-eighth session are reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

The General Assembly,

Reaffirming Principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious loss,

Emphasizing that appropriate and effective measures should be in place to ensure that those natural and legal persons, including States, that incur harm and loss as a result of such incidents are able to obtain prompt and adequate compensation,

Concerned that prompt and effective response measures should be taken to minimize the harm and loss which may result from such incidents, *Noting* that States are responsible for infringements of their obligations of prevention under international law,

Recalling the significance of existing international agreements covering specific categories of hazardous activities and stressing the importance of the conclusion of further such agreements,

Desiring to contribute to the development of international law in this field,

...

Principle 1

Scope of application

The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.

Principle 2

Use of terms

For the purposes of the present draft principles:

(*a*) "damage" means significant damage caused to persons, property or the environment; and includes:

- (i) loss of life or personal injury;
- (ii) loss of, or damage to, property, including property which forms part of the cultural heritage;
- (iii) loss or damage by impairment of the environment;
- (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;
- (v) the costs of reasonable response measures;

(*b*) "environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape;

(*c*) "hazardous activity" means an activity which involves a risk of causing significant harm;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out;

(*e*) "transboundary damage" means damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin;

(*f*) "victim" means any natural or legal person or State that suffers damage;

(*g*) "operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Principle 3

Purposes

The purposes of the present draft principles are:

(*a*) to ensure prompt and adequate compensation to victims of transboundary damage; and

(*b*) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

Principle 4

Prompt and adequate compensation

1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.

Principle 5

Response measures

Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

(*a*) the State of origin shall promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary damage;

(*b*) the State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology;

(*c*) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(*d*) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage;

(*e*) the States concerned should, where appropriate, seek the assistance of competent international organizations and other States on mutually acceptable terms and conditions.

Principle 6

International and domestic remedies

1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.

Principle 7

Development of specific international regimes

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

Principle 8

Implementation

1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.

2. The present draft principles and the measures adopted to implement them shall be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles.

2. Text of the draft principles and commentaries thereto

67. The text of the draft principles with commentaries thereto adopted by the Commission at its fifty-eighth session, are reproduced below.

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

General commentary

(1) The background to these draft principles, together with the underlying approach, is outlined in the preamble. It places the draft principles in the context of the relevant provisions of the Rio Declaration on Environment and Development but then specifically recalls the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities.

(2) It briefly provides the essential background that, even if the relevant State fully complies with its prevention obligations, under international law, accidents or other incidents may nonetheless occur and have transboundary consequences that cause harm and serious loss to other States and their nationals.

(3) It is important, as the preamble records, that those who suffer harm or loss as a result of such incidents involving hazardous activities are not left to carry those losses and are able to obtain prompt and adequate compensation. These draft principles establish the means by which this may be accomplished.

(4) As the preamble notes, the necessary arrangements for compensation may be provided under international agreements covering specific hazardous activities and the draft principles encourage the development of such agreements at the international, regional or bilateral level as appropriate.

(5) The draft principles are therefore intended to contribute to the process of development of international law in this field both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements and by indicating the matters that should be dealt with in such agreements.

(6) The preamble also makes the point that States are responsible under international law for infringement of their prevention obligations. The draft principles are therefore without prejudice to the rules relating to State responsibility and any claim that may lie under those rules in the event of a breach of the obligations of prevention.

(7) In preparing the draft principles, the Commission has proceeded on the basis of a number of basic understandings. In the first place, there is a general understanding that (a) the regime should be general and residual in character; and (b) that such a regime should be without prejudice to the relevant rules of State responsibility adopted by the Commission in 2001.[304] Secondly, there is an understanding that the scope of the liability aspects should be the same as the scope of the Draft articles on prevention of transboundary harm from hazardous activities,

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[304] For the text and commentaries of the articles on responsibility of States for Internationally wrongful acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77.

which the Commission also adopted in 2001.[305] In particular, to trigger the regime governing transboundary damage, the same threshold, "significant", that is made applicable in the case of transboundary harm is employed. The Commission also carefully considered the desirability of examining the issues concerning global commons. After observing that the issues associated with that topic are different and had their own particular features, the Commission came to the conclusion that they require a separate treatment.[306] Thirdly, the work has proceeded on the basis of certain policy considerations: (a) that while the activities contemplated for coverage under the present topic are essential for economic development and beneficial to society, the regime must provide for prompt and adequate compensation for the innocent victims in the event that such activities give rise to transboundary damage; and (b) that contingency plans and response measures should be in place over and above those contemplated in the draft articles on prevention.

(8) Fourthly, the various existing models of liability and compensation have confirmed that State liability is accepted essentially in the case of outer space activities. Liability for activities falling within the scope of the present draft principles primarily attaches to the operator; and such liability would be without the requirement of proof of fault, and may be limited or subject to conditions, limitations and exceptions. However, it is equally recognized that such liability need not always be placed on the operator of a hazardous or a risk-bearing activity and other entities could equally be designated by agreement or by law. The important point is that the person or entity concerned is functionally in command or control or directs or exercises overall supervision and hence as the beneficiary of the activity may be held liable.

(9) Fifthly, it may be noted that provision is made for supplementary funding in many schemes of allocation of loss; and such funding in the present case would be particularly important if the concept of limited liability is adopted. The basic understanding is to adopt a scheme of allocation of loss, spreading the loss among multiple actors, including as appropriate the State. In view of the general and residual character, it is not considered necessary to predetermine the share for the different actors or to precisely identify the role to be assigned to the State. At the same time, it is recognized that the State has, under international law, duties of

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[305] *Ibid.*, para. 98.

[306] See also *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 447.

prevention and these entail certain minimum standards of due diligence.[307] States are obliged in accordance with such duties to allow hazardous activities with a risk of significant transboundary harm only upon prior authorization, utilizing environmental and transboundary impact assessments and monitoring those impacts, as appropriate. The attachment of primary liability on the operator, in other words, does not in any way absolve the State from discharging its own duties of prevention under international law.

(10) Sixthly, while there is broad understanding on the basic elements to be incorporated in the regime governing the scheme of allocation of loss in case of damage arising from hazardous activities, it is understood that in most cases the substantive or applicable law to resolve compensation claims may involve other aspects such as civil liability or criminal liability or both, and would depend on a number of variables. Principles of civil law, or common law or private international law governing choice of forums as well as the applicable law may come into focus depending upon the context and the jurisdiction involved. Accordingly, the proposed scheme is not only general and residuary but is also flexible and without any prejudice to the claims that might arise or to questions of the applicable law and procedures.

(11) As the draft principles are general and residuary in character they are cast as a non-binding declaration of draft principles. The different characteristics of particular hazardous activities may require the adoption of different approaches with regard to specific arrangements. In addition, the choices or approaches adopted may vary under different legal systems. Further, the choices and approaches adopted and their implementation may also be influenced by different stages of economic development of the countries concerned.

(12) On balance, the Commission has concluded that recommended draft principles would have the advantage of not requiring a harmonization of national laws and legal systems, which is fraught with difficulties. Moreover, it is felt that the goal of widespread acceptance of the substantive provisions is more likely to be met if the outcome is cast as principles. In their essential parts, they provide that victims that suffer the damage should be compensated promptly

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[307] Birnie and Boyle have observed in respect of the draft article on prevention that "… there is ample authority in treaties and case law, and State practice for regarding … provisions of the Commission's draft convention as codification of existing international law. They represent the minimum standard required of States when managing transboundary risks and giving effect to Principle 2 of the Rio Declaration", Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002) (2nd ed.), p. 113.

and adequately; and that environmental damage, relating to which States may pursue claims, be mitigated through prompt response measures and, to the extent possible, be restored or reinstated.

(13) The commentaries are organized as containing an explanation of the scope and context of each draft principle, as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the elaboration of specific international regimes. The focus of the Commission was on the formulation of the substance of the draft principles as a coherent set of standards of conduct and practice. It did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles are formulated is not intended to affect that question.

Preamble

The General Assembly,

Reaffirming Principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,[308]

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious loss,

Emphasizing that appropriate and effective measures should be in place to ensure that those natural and legal persons, including States, that incur harm and loss as a result of such incidents are able to obtain prompt and adequate compensation,

Concerned that prompt and effective response measures should be taken to minimize the harm and loss which may result from such incidents,

Noting that States are responsible for infringements of their obligations of prevention under international law,

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[308] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

Recalling the significance of existing international agreements covering specific categories of hazardous activities and stressing the importance of the conclusion of further such agreements,

Desiring to contribute to the development of international law in this field,

...

Commentary

(1) In the past, the Commission has generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. However, there have also been precedents during which the Commission has submitted a draft preamble. This was the case with respect to the two Draft Conventions on the Elimination of Future Statelessness and on the Reduction of the Future Statelessness, the Draft articles on the Nationality of natural persons in relation to the succession of States, as well as with respect to the draft articles on prevention. Since the Commission would be presenting draft declaration of principles, a preamble is considered all the more pertinent.

(2) As noted in the introduction, the first preambular paragraph commences with a reference to Principles 13 and 16 of the Rio Declaration on Environment and Development.[309] The need to develop national law regarding liability and compensation for the victims of pollution and other environmental damage is stressed in Principle 13 of that Declaration, which reiterates Principle 22 of the Stockholm Declaration on the Human Environment. Principle 16 of the Rio Declaration addresses the promotion of internalization of environmental costs, taking into account the polluter-pays principle. The Commission considers the polluter-pays principle as an essential component in underpinning the present draft principles to ensure that victims that suffer harm as a result of an incident involving a hazardous activity are able to obtain prompt and adequate compensation.

(3) The second preambular paragraph is self-explanatory. It links the present draft principles to the draft articles on prevention. The third, fourth, fifth and sixth preambular paragraphs seek to provide the essential rationale for the present draft principles.

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[309] *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and Corrigenda), vol. I: *Resolutions adopted by the Conference, resolution 1, annex I.*

(4) The seventh preambular paragraph stresses that these draft principles do not affect the responsibility that a State may incur as a result of infringement of its obligations of prevention under international law; it seeks to keep claims arising from implementation of that regime from the scope of application of these draft principles.

(5) The eighth preambular paragraph recognizes the existence of specific international agreements for various categories of hazardous activities and the importance of concluding further such agreements, while the last preambular paragraph captures the desire to contribute to the process of development of international law in this field.

Principle 1

Scope of application

> The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.

Commentary

(1) The "Scope of application" provision is drafted to contextualize the draft principles and to reflect the understanding that the present draft principles would have the same scope of application as the 2001 Draft articles on prevention of transboundary harm from hazardous activities. The interrelated nature of the concepts of "prevention" and "liability" needs no particular emphasis in the context of the work of the Commission.[310] This provision identifies that the focus of the present draft principles is transboundary damage. The notion of "transboundary damage", like the notion of "transboundary harm", focuses on damage caused in the jurisdiction of one State by activities situated in another State.

(2) In the first instance, hazardous activities coming within the scope of the present draft principles are those not prohibited by international law and involve "the risk of causing significant transboundary harm through their physical consequences". Different types of activities could be envisaged under this category. As the title of the draft principles indicates, any hazardous or by implication any ultrahazardous activity, which involves, at a minimum, a risk of causing significant transboundary harm is covered. These are activities

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[310] See the recommendation of the 2002 Working Group of the Commission, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum* (A/57/10 and Corr.1), paras. 447-448.

that have a high probability of causing significant transboundary harm or a low probability of causing disastrous transboundary harm. The combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact separates such activities from any other activities.[311]

(3) Following the same approach adopted in the case of the draft articles on prevention, the Commission opted to dispense with specification of a list of activities. Such specification of a list of activities is not without problems and functionally it is not considered essential. Any such list of activities is likely to be under-inclusive and might quickly need review in the light of ever evolving technological developments. Further, except for certain ultrahazardous activities which are mostly the subject of special regulation, e.g., in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. It is felt that it is difficult to capture these elements in a generic list. However, the activities coming within the scope of the present principles are the same as those that are subject to the requirement of prior authorization under the draft articles on prevention. Moreover, it is always open to States to specify activities coming within the scope of the present principles through multilateral, regional or bilateral arrangements[312] or to do so in their national legislation.

(4) The phrase "transboundary damage caused by hazardous activities not prohibited by international law" has a similar import as the phrase "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical

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[311] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, para. (1) of the commentary to article 2 (a) of the draft articles on prevention.

[312] For example, various liability regimes deal with the type of activities which come under their scope: the 1992 Convention on the Protection of Marine Environment of the Baltic Sea Area, [IMO 1] LDC.2/Circ.303 (see also United Nations, Law of the Sea Bulletin, No. 22 (1993), p. 54); the 1992 Convention on the Transboundary Effects of Industrial Accidents (doc. ENVWA/R.54 and Add.1), reprinted in ILM vol. 31 (1992), p. 1333; annex I to the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003 Kiev Protocol), UNECE document MP/WAT/2003/1-CP.TEIA/2003/3 of 11 March 2003; annex II to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) (*European Treaty Series*, No. 150. See also ILM vol. 32 (1993), p. 128), where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I. See also Directive 2004/35/CE of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJL 143/56 30.4.2004, vol. 47).

consequences" in the draft articles on prevention. It has a particular meaning, which is well understood as containing four elements, namely (a) such activities are not prohibited by international law; (b) such activities involve a risk of causing significant harm; (c) such harm must be transboundary; and (d) the transboundary harm must be caused by such activities through their physical consequences.[313]

(5) Like the draft articles on prevention, the activities coming within the scope of the present principles have an element of human causation and are qualified as "activities not prohibited by international law". This particular phrase has been adopted essentially to distinguish the present principles from the operation of the rules governing State responsibility. The Commission recognized the importance, not only of questions of responsibility for internationally wrongful acts, but also questions concerning the obligation to make good any harmful consequences arising out of certain activities, especially those which, because of their nature, present certain risks. However, in view of the entirely different basis of liability for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, the Commission decided to address the two subjects separately.[314] That is, for the purpose of the principles, the focus is on the consequences of the activity and not on the lawfulness of the activity itself.

(6) The present draft principles, like the draft articles on prevention, are concerned with primary rules. Accordingly, the non-fulfilment of the duty of prevention prescribed by the draft articles on prevention could engage State responsibility without necessarily giving rise to the implication that the activity itself is prohibited.[315] In such a case, State responsibility could be

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[313] For the commentaries on prevention see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, commentary to draft article 1.

[314] *Yearbook ... 1973*, vol. II, para. 38.

[315] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/56/10), para. 98, commentary to article 1, para. (6), p. 382. See also M.B. Akehurst "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 3-16; Alan E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?", ICLQ, vol. 39 (1990), pp. 1-25; Karl Zemanek, "State Responsibility and Liability", in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (London: Graham & Trotman, 1991), p. 197; P.S. Rao, the Second Report on Prevention of Transboundary Damage from Hazardous Activities, document A/CN.4/501, paras. 35-37. J. Barboza, "La responsabilité 'causale' à la Commission du droit international", AFDI, 1988, pp. 513-522; P. Cahier, "Le problème de la responsabilité pour risque en droit international", in IUHEI, les relations internationales dans un monde en mutation (Leyden: Sijthoff, 1977), pp. 409-434; C-G. Laubet, "Le droit internationale enquête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas", AFDI, 1983, pp. 99-120; D. Levy, "Responsabilité pour omission et responsabilité pour risque en droit international

invoked to implement not only the obligations of the State itself but also the civil responsibility or duty of the operator.[316] Indeed, this is well understood throughout the work on draft articles on prevention.[317]

(7) It is recognized that harm could occur despite implementation of the duties of prevention. Transboundary harm could occur for several other reasons not involving State responsibility. For instance, there could be situations where the preventive measures were followed but in the event proved inadequate or where the particular risk that caused transboundary harm could not be identified at the time of initial authorization and hence appropriate preventive measures were not envisaged.[318] In other words, transboundary harm could occur accidentally or it may take place in circumstances not originally anticipated. Further, harm could occur because of gradually accumulated adverse effects over a period of time. This distinction ought to be borne in mind for purposes of compensation. Because of problems of establishing a causal link between the hazardous activity and the damage incurred, claims in the latter case are not commonplace.[319]

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public", RGDIP, 1961, pp. 744-764; P. Strurma, "La responsabilité en dehors de l'illicite en droit international économique", PYBIL, 1993, pp. 91-112.

[316] See P.M. Dupuy, La responsabilité internationale des États pour les dommages d'origine techologique et industrielle (Paris: Pedone, 1977), p. 319; I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford: Clarendon Press, 1983), p. 50; A. Rosas, "State Responsibility and Liability under Civil Liability Regimes", in O. Bring and Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives* (Essays in honour of Jerzy Sztucki) (Boston: M. Nijhoff, 1994); and Fouad Bitar "Les mouvements transfrontaliers de déchets dangereux selon la Convention de Bâle", *Etude des régimes de responsabilité* (Paris: Pedone, 1997), pp. 79-137. However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also P.M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?" in *Revue générale de droit international public* (1997-4), pp. 873-903; Teresa A. Berwick, "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes", *Georgetown International Environmental Review* (1998), pp. 257-267; and P.M. Dupuy, "A propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l'environnement", in M. Prieur & C. Lambrechts, *Les Hommes et l'environnement: Études en hommage à Alexandre Kiss* (Paris: Frison-Roche, 1998).

[317] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 443.

[318] *Ibid.*, para. 444.

[319] See Peter Wetterstein "A Proprietary or Possessory Interest: A Condition *sine qua non* for claiming damage for environmental impairment", in Peter Wetterstein, *Harm to the Environment: the Right to Compensation and Assessment of Damage* (Oxford: Clarendon Press (1997)), p. 30. See also Xue Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003), pp. 19-105 and 113-182.

(8) For the purpose of the present draft principles it is assumed that duties of due diligence under the obligations of prevention have been fulfilled. Accordingly, the focus of the present draft principles is on damage caused despite the fulfilment of such duties.

(9) The second criterion, implicit in the present provision on scope of application, is that activities covered by these principles are those that originally carried a "risk" of causing significant transboundary harm. As noted in paragraph (2) above, this risk element encompasses activities with a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm.[320]

(10) The third criterion is that the activities must involve "transboundary" harm. Thus, three concepts are embraced by the (extra)-territorial element. The term "transboundary" harm comprises questions of "territory, jurisdiction" and "control".[321] The activities must be conducted in the territory or otherwise in places within the jurisdiction or control of one State and have an impact in the territory or places within the jurisdiction or control of another State.

(11) It should be noted that the draft principles are concerned with "transboundary damage caused" by hazardous activities. In the present context, the reference to the broader concept of transboundary harm has been retained where the reference is only to the risk of harm and not to the subsequent phase where harm has actually occurred. The term "damage" is employed to refer to the latter phase. The notion of "transboundary damage" is introduced to denote specificity to the harm, which occurred. The term also has the advantage of familiarity. It is the usual term used in liability regimes.[322] The word "transboundary" qualifies "damage" to stress the transboundary orientation of the scope of the present principles.

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[320] See also *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, the commentary to draft article 2, para. (1), p. 387.

[321] *Ibid.*, para. 98, the commentary to draft article 1, paras. (7)-(12).

[322] Damage is defined in article 2, para. 2 (c) of the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and Their Disposal (Document UNEP-CHW.5/29); article 2, para. 2 (d) of the 2003 Kiev Protocol; article 2, para. 7 of the 1993 Lugano Convention; article 1, para. 6 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) (IMO document LEG/CONF.10/8/2. See also ILM vol. 35 (1996) 1415); article 1, para. 10 of the 1989 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Doc. ECE/TRANS/79, for text see also *Revue de droit uniforme* (UNIDROIT) 1989 (I), p. 280). See also article 2, para. 2 of the 2004 European Parliament and the Council Directive 2004/35/CE on environmental liability with regard to prevention and remedying of environmental damage (OJ L 143/56. 30.4.2004. Volume 47);

(12) Another important consideration which delimits the scope of application is that transboundary harm caused by State policies in trade, monetary, socio-economic or similar fields is excluded from the scope of the present principles.[323] Thus, significant transboundary harm must have been caused by the "physical consequences" of activities in question.

Principle 2

Use of terms

For the purposes of the present draft principles:

(*a*) "damage" means significant damage caused to persons, property or the environment; and includes:

(i) loss of life or personal injury;

(ii) loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) loss or damage by impairment of the environment;

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article I (a) of the 1972 Convention on International Liability for Damage Caused by Space Objects of 1972 (United Nations, *Treaty Series*, vol. 961, p. 187).

Pollution damage is defined in article 1, para. 6 of the 1969 International Convention on Civil Liability for Oil Pollution Damage (United Nations, *Treaty Series*, vol. 973, p. 3); article 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage (IMO document LEG/CONF.9/15. See also Birnie and Boyle, *Basic Documents on International Law and the Environment* (Oxford: Clarendon Press, 1995), pp. 91-106); article 1, para. 9 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (IMO document LEG/CONF.12/DC/1); article 1, para. 6 of the 1977 International Convention on Civil Liability for Oil Pollution Damage resulting from the Exploration for and Exploitation of Seabed Mineral Resources (ILM vol. 16 (1977) 1451).

For definition of nuclear damage, see article I, para. 1 k of 1963 of the Vienna Convention on Civil Liability for Nuclear Damage (ILM vol. 2 (1963) 727); article I, para. 1 (k) of the 1997 Protocol to Amend the 1963 Vienna Convention (ILM vol. 36 (1997) 1462); article 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage (ILM vol. 36 (1997) 1473); article I, para. (a) (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy (www.nea.fr/html/law).

See also article 1 (15) of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (ILM vol. 27 (1988) 859), which defines damage to the Antarctic environment or dependent or associated ecosystems; and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (General Assembly resolution 51/229 of 21 May 1997, for text see UN document A/51/869. See also ILM vol. 36 (1997) 700) which seeks in article 7 to "prevent the causing of significant harm". Article 2 (b) of Annex VI of the Protocol on Environmental Protection to the Antarctic Treaty on Liability arising from environmental emergencies defines "environmental emergency" means "any accidental event that … results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment".

[323] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, the commentary to draft article 2, paras. (16) and (17), p. 386.

(iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures;

(*b*) "environment" includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

(*c*) "hazardous activity" means an activity which involves a risk of causing significant harm;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out;

(*e*) "transboundary damage" means damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin;

(*f*) "victim" means any natural or legal person or State that suffers damage;

(*g*) "operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Commentary

(1) The present "Use of terms" seeks to define and set out the meaning of the terms or concepts used in the present draft principles. The definition of damage is crucial for the purposes of the present draft principles. The elements of damage are identified in part to set out the basis of claims for damage. Before identifying the elements of damage, it is important to note that damage to be eligible for compensation should acquire a certain threshold. For example, the *Trail Smelter* award addressed an injury by fumes, when the case is of "serious consequences", and the injury is established by clear and convincing evidence.[324] The *Lake Lanoux* award made reference to serious injury.[325] A number of conventions have also referred to "significant", "serious" or "substantial" harm or damage as the threshold for giving rise to

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[324] *Trail Smelter Arbitration (United States of America v. Canada)* (Second award); UNRIAA, vol. III, p. 1905 at p. 1965.

[325] *Lake Lanoux Arbitration (France v. Spain)*, *ibid.*, vol. XII, pp. 281-317.

legal claims.[326] "Significant" has also been used in other legal instruments and domestic law.[327] The threshold is designed to prevent frivolous or vexatious claims.

(2) The term "significant" is understood to refer to *something more than "detectable" but need not be at the level of "serious" or "substantial"*.[328] The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards. The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories,

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[326] See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities (ILM vol. 27 (1988), p. 868); articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context (ILM vol. 30 (1991), p. 802); 1991 UNECE Convention on the Transboundary Effects of Industrial Accidents (article 1 (d)); and article 7 of the Convention on the Non-navigational Uses of International Watercourses. See also Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: OUP, 2000), p. 176; Rene Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague: Kluwer Law International, 1996), pp. 86-89 who notes the felt need for a threshold and examines the rationale for and the possible ways of explaining the meaning of the threshold of "significant harm". See also J.G. Lammers, *Pollution of International Watercourses* (The Hague: Martinus Nijhoff Publishers, 1984), pp. 346-347, and R. Wolfrum "Purposes and Principles of International Environmental Law", *German Yearbook of International Law*, vol. 33 (1991), pp. 308-330 at p. 311. As a general rule, noting the importance of a threshold of damage for triggering claims for restoration and compensation, while considering environmental damage, it is suggested that "the more the effects deviate from the state that would be regarded as being sustainable and the less foreseeable and limited the consequential losses are, the closer the effects come to the threshold of significance". This is to be determined against a "baseline condition", which States generally define or should define: see Rudiger Wolfrum, Christine Langenfeld and Petra Minnerop, *Environmental Liability in International Law - Towards a Coherent Conception* (Berlin: Erich Schmidt Verlag), 2005, p. 501.

[327] See for example, article 5 of the draft Convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (Organization of American States, Rios y Lagos Internacionales, 4th ed. 1971), p. 132; the 1990 UN/ECE Guidelines on Responsibility and Liability Regarding Transboundary Water Pollution; the Helsinki Rules on the Uses of the Waters of International Rivers, article 10, *International Law Association, Report of the Fifty-second Conference* (Helsinki, 1966), p. 496; article 16 of the 2004 Berlin Rules on Water, available at >http://www.ila-hq.org/pdf/Water%20Resources/Final%20Report%202004.pdf >); paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; Recommendation of the Council of the Organization for Economic Cooperation and Development (OECD) on Principles concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reprinted in ILM vol. 14 (1975), p. 246; the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and article 7 of the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, in ILM vol. 22 (1983), p. 1025. The United States has also used the word "significant" in its domestic law dealing with environmental issues: see the *American Law Institute, Restatement of the Law*, Section 601, Reporter's Note 3, pp. 111-112.

[328] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 98, the commentary to draft article 2, paras. (4) and (5).

States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable and do not fall within the scope of the present draft principles.

(3) The determination of "significant damage" involves both factual and objective criteria, and a value determination. The latter is dependent on the circumstances of a particular case and the period in which it is made. For instance, a deprivation which is considered significant in one region may not necessarily be so in another. A certain deprivation at a particular time might not be considered "significant" because scientific knowledge or human appreciation at that specific time might have considered such deprivation tolerable. However, that view might later change and the same deprivation might then be considered "significant damage". For instance, the sensitivity of the international community to air and water pollution levels has been constantly undergoing change.

(4) Paragraph (a) defines "damage", as significant damage caused to persons, property or the environment. Subparagraphs (i) and (ii) cover personal injury and property damage, including some aspects of consequential economic loss, as well as property, which forms part of the national cultural heritage, which may be State property.

(5) Damage does not occur in isolation or in a vacuum. It occurs to somebody or something, it may be to a person or property. In subparagraph (i) damage to persons includes loss of life or personal injury. There are examples at domestic law[329] and in treaty practice.[330] Even those

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[329] The Environmental Liability Act of Germany for example covers anybody who suffers death or personal injury. The Environmental Damage Compensation Act of Finland, the Environmental Code of Sweden, the Compensation for Environmental Damage Act of Denmark all cover personal injury. See generally, Peter Wetterstein, "Environmental Damage in the Legal Systems of the Nordic Countries and Germany", in Michael Bowman and Alan Boyle, *Environmental Damage in International Law and Comparative Law: Problems of Definition and Evaluation* (Oxford: OUP, 2002), pp. 222-242.

[330] Some liability regimes provide as follows: article I, paragraph 1 k of the 1963 Vienna Convention on Civil Liability for Nuclear Damage defines nuclear damage to include "(i) loss of life, any personal injury or any loss of, or damage to, property …"; article I, paragraph 1 (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1997 Vienna Convention), also refers to "(i) loss of life or personal injury; (ii) loss of or damage to property; …" article I, paragraph vii of the 2004 Paris Convention defines nuclear damage to include "1. loss of life or personal injury; 2. loss of or damage to property; …" the CTRD defines the concept of "damage" in paragraph 10 of article 1 "(a) loss of life or personal injury ...; (b) loss of or damage to property ..."; the Basel Protocol defines "damage", in article 2, paragraph 2 (c), as: "(i) Loss of life or personal injury; (ii) Loss of or damage to property other than property held by the person liable in accordance with the present protocol"; the Kiev Protocol, defines damage in article 2, paragraph 2 (d), as: "(i) Loss of life or personal injury; (ii) Loss of, or damage to, property other than property held by the person liable in accordance with the Protocol"; the Lugano Convention defines damage in article 2 (7) as: "a. Loss of life or personal injury; b. Loss or damage to property

liability regimes that exclude application of injury to persons recognize that other rules would apply.[331] Those regimes that are silent on the matter do not seem to entirely exclude the possible submission of a claim under this heading of damage.[332]

(6) In subparagraph (ii) damage to property, includes loss of or damage to property. Property includes movable and immovable property. There are examples at domestic law[333] and in treaty practice.[334] Some liability regimes exclude claims concerning damage to property of the person liable on the policy consideration which seeks to deny a tortfeasor the opportunity to benefit from one's own wrongs. Article 2 (2) (c) (ii) of the Basel Protocol, article 2 (7) (b) of the Lugano Convention and article 2 (2) (d) (ii) of the Kiev Protocol contain provisions to this effect.

(7) Traditionally, proprietary rights have been more closely related to the private rights of the individual rather than rights of the public. An individual would face no difficulty to pursue a claim concerning his personal or proprietary rights. These are claims concerning possessory or proprietary interests which are involved in loss of life or personal injury or loss of, or damage to property. Furthermore, tort law has also tended to cover damage that may relate to economic losses. In this connection, a distinction is often made between consequential and pure economic losses.[335]

(8) For the purposes of the present draft principles, consequential economic losses are covered under subparagraphs (i) and (ii). Such losses are the result of a loss of life or personal

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other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity".

[331] EU Council and Parliament Directive 2004/34/CE on environmental liability does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any rights regarding such types of damages.

[332] Pollution damage is defined in article 1, para. 6 of the International Convention on Civil Liability for Oil Pollution Damage (United Nations, *Treaty Series*, vol. 973, p. 3); article 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage (IMO document LEG/CONF.9/15), article 1, para. 9.

[333] For example, the Environmental Damage Compensation Act of Finland covers damage to property; Chapter 32 of the Environmental Code of Sweden; and the Compensation for Environmental Damage Act of Denmark covers damage to property.

[334] See examples in footnote 330, above.

[335] Bjorn Sandvik and Satu Suikkari, "Harm and Reparation in International Treaty regimes: An Overview", in Peter Wetterstein, *Harm to the Environment …, op. cit.* p. 57. See generally, Edward H.P. Brans, *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment* (The Hague/London/New York: Kluwer Law International, 2001), pp. 9-63. See also Julio Barboza, Special Rapporteur, Eleventh report, document A/CN.4/468 (1995).

injury or damage to property. These would include loss of earnings due to personal injury. Such damage is supported in treaty practice[336] and under domestic law although different approaches are followed, including in respect of compensation for loss of income. [337] Other economic loss may arise that is not linked to personal injury or damage to property. In the absence of a specific legal provision for claims covering loss of income it would be reasonable to expect that if an incident involving a hazardous activity directly causes loss of income, efforts would be made to ensure the victim is not left uncompensated.

(9) Subparagraph (ii) also covers property which forms part of cultural heritage. State property may be included in the national cultural heritage. It embraces a wide range of aspects, including monuments, buildings and sites, while natural heritage denotes natural features and sites and geological and physical formations. Their value cannot easily be quantifiable in monetary terms but lies in their historical, artistic, scientific, aesthetic, ethnological, or anthropological importance or in their conservation or natural beauty. The 1972 Convention concerning the Protection of World Cultural and Natural Heritage has a comprehensive

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[336] See for example article I (1) (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, defines nuclear damage as including … each of the following to the extent determined by the law of the competent court (iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court … See also article 1 of the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage, which covers and each of the following to the extent determined by the law of the competent court: … (iii) economic loss arising from loss or damage referred to in subparagraph (i) or (ii), insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage; … (vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court. Article I (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy defines nuclear damage as including each of the following to the extent determined by the law of the competent court, … (3) economic loss arising from loss or damage referred to in subparagraph 1 or 2 above insofar as not included in those subparagraphs, if incurred by a person entitled to claim in respect of such loss or damage.

[337] For example, under section 2702 (b) of the United States Oil Pollution Act any person may recover damages for injury to, or economic losses resulting from the destruction of real or personal property which shall be recoverable by a claimant who owns or leases such property. The subsection also provides that any person may recover "damages equal to the *loss of profits or impairment of earning capacity* due to the injury, destruction, or loss of real property, personal property …". Similarly, section 252 of the German Civil Code provides that any loss of profit is to be compensated.

definition of cultural heritage.[338] Not all civil liability regimes include aspects concerning cultural heritage under this head. For example, the Lugano Convention includes in its definition of "environment", property which forms part of the cultural heritage and to that extent cultural heritage may also be embraced by the broader definition of environment.[339]

(10) Respecting and safeguarding cultural property are primary considerations in times of peace as they are in times of armed conflict. This principle is asserted in the Hague Convention for the Protection of Cultural Property in the event of armed conflict.[340] Moreover, international humanitarian law prohibits commission of hostilities directed against historical monuments and works of art which constitute the cultural heritage of peoples.[341]

(11) Subparagraphs (iii) to (v) deal with claims that are usually associated with damage to the environment. They may all be treated as parts of one whole concept. Together, they constitute the essential elements inclusive in a definition of damage to the environment. These subparagraphs are concerned with questions concerning damage to the environment *per se*. This is damage caused by the hazardous activity to the environment itself with or without simultaneously causing damage to persons or property and hence is independent of any damage to such persons and property. The broader reference to claims concerning the environment

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[338] ILM vol.11 (1972) 1294. Article 1 defines "cultural heritage" for purposes of the Convention as:

> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

See also definition of cultural property in article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the event of armed conflict, which essentially covers movable and immovable property of great importance to the cultural heritage of peoples. See also 1972 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

[339] See also article 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[340] Done at The Hague on 14 May 1954.

[341] The Additional Protocols to the Geneva Conventions, article 53 of Protocol I and article 16 of Protocol II. See also the Hague Conventions of 1907, particularly Convention IV and its Regulations concerning the Laws and Customs of War on Land, (articles 27 and 56 of the Regulations), and Convention IX, respecting Bombardment by Naval Forces in Time of War (article 5).

incorporated in subparagraphs (iii)-(v) thus not only builds upon trends that have already become prominent as part of recently concluded international liability regimes[342] but opens up possibilities for further developments of the law for the protection of the environment *per se*.[343]

(12) An oil spill off a seacoast may immediately lead to lost business for the tourism and fishing industry within the precincts of the incident. Such claims have led to claims of pure economic loss in the past without much success. However, some liability regimes now recognize this head of compensable damage.[344] Article 2 (d) (iii) of the Kiev Protocol and article 2 (2) (d) (iii) of the Basel Protocol cover loss of income directly deriving from an economic interest in any use of the environment, incurred

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[342] For an analysis of these developments, see Louise de la Fayatte, "The Concept of Environmental Damage in International Liability Regimes", in Michael Bowman and Alan Boyle, *Environmental Damage in International and Comparative Law … op. cit.*, pp. 149-189. See also Edward H.P. Brans, *Liability for Damage to Public Natural Resources* … op.cit., ch. 7 concerning international civil liability for damage to natural resources.

[343] Italian law for example appears to go further in recognizing damage to the environment *per se* and Italy is also a signatory to the 1993 Lugano Convention on Damage Resulting from Activities Dangerous to the Environment. In the *Patmos* case, Italy lodged a claim for 5,000 million lire before the court of Messina, Italy, for ecological damage caused to its territorial waters as a result of 1,000 tonnes of oil spilled into the sea, following a collision between the Greek oil tanker Patmos and the Spanish tanker Castillo de Monte Aragon on 21 March 1985. While the lower Court rejected its claim, the higher Court on appeal upheld its claim in the Patmos II. According to the Court:

> "although the notion of environmental damage cannot be grasped by resorting to any mathematical or accounting method, it can be evaluated in the light of the economic relevance that the destruction, deterioration, or alteration of the environment has per se and for the community, which benefits from environmental resources and, in particular, from marine resources in a variety of ways (food, health, tourism, research, biological studies)".

Noting that these benefits are the object of protection of the State, it was held that the State can claim as a trustee of the community compensation for the diminished economic value of the environment. The Court also observed that the loss involved not being assignable any market value, compensation can only be provided on the basis of an equitable appraisal. The court, after rejecting the report received from experts on the quantification of damages, which attempted to quantify the damage on the basis of the nekton (fish) which the biomass could have produced had it not been polluted, resorted to an equitable appraisal and awarded 2,100 million lire. Incidentally, this award fell within the limits of liability of the owner, as set by the IOPC Fund and was not appealed or contested, see generally Andrea Bianchi, "Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law", in Peter Wetterstein, *Harm to the Environment … op. cit.*, pp. 103 at 113-129. See also Maria Clara Maffei "The Compensation for Ecological Damage in the 'Patmos' case", in Francesco Francioni and Tullio Scovazzi, *International Responsibility for Environmental Harm* (London/Dordrecht/ Boston: Graham & Trotman 1991).

[344] See Peter Wetterstein, "A Proprietary or Possessory Interest: A *Conditio Sine Qua Non* for Claiming Damages for environmental Impairment?", *op. cit.*, p. 37. On the need to limit the concept of "directly related" "pure economic loss" with a view not to open floodgates or enter "damages lottery" encouraging indeterminate liability which will then be a disincentive to get proper insurance or economic perspective, see Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (The Hague: Kluwer Law International, 2001), pp. 346-350. It is also suggested that such an unlimited approach may limit "the acceptance of the definition of damage and thus, it has to be solved on the national level". Rudiger Wolfrum, Christine Langenfeld and Petra Minnerop, *op. cit.*, p. 503. The European Directive 2004/35 covers environmental damage in article 2.

as a result of impairment of the environment, taking into account savings and costs.[345] In the case of the Kiev Protocol such interest should be a "legally protected interest". Examples also exist at the domestic level.[346]

(13) Subparagraph (iii) relates to the form that damage to the environment would take. This would include "loss or damage by impairment". Impairment includes injury to, modification, alteration, deterioration, destruction or loss. This entails diminution of quality, value or excellence in an injurious fashion. Claims concerning loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment may fall under this heading.

(14) In other instances of damage to the environment *per se*, it is not easy to establish standing. Some aspects of the environment do not belong to anyone, and are generally considered to be common property (*res communis omnium*) not open to private possession, as opposed to *res nullius*, that is, property not belonging to anyone but open to private possession. A person does not have an individual right to such common property and would

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[345] See Article I (1) (k) of the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, defines nuclear damage as including … each of the following to the extent determined by the law of the competent court (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii); see also article 1 of the 1997 Convention on Supplementary Compensation for Nuclear Damage, which covers each of the following to the extent determined by the law of the competent court: … (v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph (ii); Article I (vii) of the 2004 Protocol to amend the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy defines nuclear damage as including each of the following to the extent determined by the law of the competent court, … (5) loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph 2 above; … See also for example, the Lugano Convention (article 2, para. (7) (d)); the 1991 ECE Convention on the Transboundary Effects of Industrial Accidents (article 1 (c)); the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (article 1 (2)); the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) (article 8 (2) (a), (b) and (d)); the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (article 9 (c) and (d)).

[346] Subsection 2702 (b) of the United States Oil Pollution Act provides that any person may recover "damages equal to the *loss of profits or impairment of earning capacity* due to the injury, destruction, or loss of … natural resources". The Environmental Damage Compensation Act of Finland covers pure economic loss, except where such losses are insignificant. Chapter 32 of the Environmental Code of Sweden also provides for pure economic loss. Pure economic loss not caused by criminal behaviour is compensable only to the extent that it is significant. The Compensation for Environmental Damage Act of Denmark covers economic loss and reasonable costs for preventive measures or for the restoration of the environment. See generally, Peter Wetterstein, "Environmental Damage in the Legal Systems of the Nordic Countries and Germany", in Michael Bowman and Alan Boyle, *Environmental Damage in International Law and Comparative Law … op. cit.*, pp. 222-242.

not ordinarily have standing to pursue a claim in respect of damage to such property.[347] Moreover, it is not always easy to appreciate who may suffer loss of ecological or aesthetic values or be injured as a consequence for purposes of establishing a claim. States instead may hold such property in trust, and usually public authorities and more recently, public interest groups, have been given standing to pursue claims.[348]

(15) It may be noted that the references to "costs of reasonable measures of reinstatement" in subparagraph (iv), and reasonable costs of "clean-up" associated with the "costs of reasonable response measures" in subparagraph (v) are recent concepts. These elements of damage have gained recognition because, as noted by one commentator, "there is a shift towards a greater focus on damage to the environment *per se* rather than primarily on damage to persons and to property".[349] Subparagraph (iv) includes in the concept of damage an element of the type of compensation that is available, namely reasonable costs of measures of reinstatement. Recent treaty practice[350] and domestic law[351] has tended to acknowledge the importance of such

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[347] In Burgess v. M/V Tamano, 370 F.Supp (1973) 247 at 247, the court noted that: "It is also uncontroverted that the right to finish or to harvest clams … is not the private right of any individual, but is a public right held by the State 'in trust for the common benefit of the people' …".

[348] Under the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A., sections 9601 et seq.; Clean Water Act of 1977, 33 U.S.C.A., section 1321; Oil Pollution Act of 1990, 33 U.S.C.A., sections 2701 et seq.; the United States "Congress empowered government agencies with management jurisdiction over natural resources to act as trustees to assess and recover damages ... [t]he public trust is defined broadly to encompass 'natural resources' ... belonging to, managed by, held in trust by, appertaining to or otherwise controlled by Federal, state or local governments or Indian tribes".

[349] Louise de la Fayette, "The Concept of Environmental Damage in International Law", … *op. cit.*, pp. 149-190, at pp. 166-167.

[350] See for example the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, article I, paragraph 1 (k) (iv): "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in sub-paragraph (ii)"; the 2004 Paris Convention on Third Party Liability (article I (vii) (4)): "the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in sub-paragraph 2". Article 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage refers to impairment of the environment other than loss of profit from such impairment shall be limited to costs of reinstatement actually undertaken or to be undertaken. See also article 2 (2) (c) (iv) and (d) of the Basel Protocol, article 2 (7) (c) and (8) of the Lugano Convention and article 2 (2) (d) (iv) and (g) of the Kiev Protocol.

[351] German law allows for reimbursement of reasonable costs of reinstatement and restoration of environmental damage through making good the loss suffered by individuals but that may also involve restoring the environment to its *status quo*. See section 16 of the Environmental Liability Act and section 32 of the Genetic Engineering Act provides that in the event of impairment of a natural complex, section 251 (2) of the Civil Code is to be applied with the proviso that the expenses of restoring the *status quo* shall not be deemed unreasonable merely because it exceeds the value of the object concerned. See Environmental Liability Law in Germany (Grote/Renke) in Rudiger Wolfrum, Christine Langenfeld and Petra Minnerop, *Environmental Liability in International Law* … *op. cit.*, pp. 223-303, p. 278.

measures, but has left it to domestic law to indicate who may be entitled to take such measures. Such measures have been described as any reasonable measures aiming to assess, reinstate, or restore damaged or destroyed components of the environment or where this is not possible, to introduce, where appropriate, the equivalent of these components into the environment.[352]

(16) The reference to "reasonable" is intended to indicate that the costs of such measures should not be excessively disproportionate to the usefulness resulting from the measure. In the *Commonwealth of Puerto Rico v. Zoe Colocotroni*, the United States Court of Appeals, First Circuit, stated:

> "[Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive."[353]

(17) Subparagraph (v) includes costs of reasonable response measures in the concept of damage as an element of available compensation. Recent treaty practice has tended to acknowledge the importance of such measures, but has left it to domestic law to indicate who may be entitled to take such measures.[354] Such measures include any reasonable measures taken

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[352] It may be noted that in the context of the work of the United Nations Compensation Commission a recent decision sanctioned compensation in respect of three projects: for loss of rangeland and habitats, Jordan got $160 million; for shoreline preserves, Kuwait got $8 million; and Saudi Arabia got $46 million by way of replacing ecological services that were irreversibly lost in the wake of the 1991 Gulf War: see Panel Report F4/5, S/AC.26/2005/10. Technical Annexes I-III, see also Peter H. Sand, "Compensation for Environmental Damage from the 1991 Gulf War", *Environmental Policy and Law*, vol. 35/6 (2005), pp. 244-249, at p. 247.

[353] 628 F.2 d, p. 652 (1st Cir. 1980), cited in Colin de la Rue, "Environmental Damage Assessment" in Ralph P. Kroner (ed.) *Transnational Environmental Liability and Insurance* (Graham and Trotman and International Bar Association, 1993), p. 71.

[354] See for example the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, article I, paragraph 1 (k) (vi): "the costs of preventive measures, and further loss or damage caused by such measures; the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage, article 1 (vi): the costs of preventive measures, and further loss or damage caused by such measures"; the 2004 Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of 1960, article I (vii) (6): "the costs of preventive measures, and further loss or damage caused by such measures, in the case of

by any person including public authorities, following the occurrence of the transboundary damage, to prevent, minimize, or mitigate possible loss or damage or to arrange for environmental clean-up. The measures of response must be reasonable.

(18) Recent trends are also encouraging in allowing compensation for loss of "non-use value" of the environment. There is some support for this claim from the Commission itself when it adopted its draft articles on State responsibility, even though it is admitted that such damage is difficult to quantify.[355] The recent decisions of the United Nations Compensation Commission (UNCC) in opting for a broad interpretation of the term "environmental damage" is a pointer of developments to come. In the case of F-4 category of environmental and public health claims, the F-4 Panel of the UNCC allowed claims for compensation for damage to natural resources without commercial value (so-called "pure" environmental damage) and also claims where there was only a temporary loss of resource use during the period prior to full restoration.[356]

(19) Paragraph (b) defines "environment". Environment could be defined in different ways for different purposes and it is appropriate to bear in mind that there is no universally accepted

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sub-paragraphs 1 to 5 above, to the extent that the loss or damage arises out of or results from ionising radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive". Article 1, para. 6 of the 1992 International Convention on Civil Liability for Oil Pollution Damage, refers to costs of preventive measures and further loss or damage caused by preventive measures. See also article 2 (2) (c) (v) and (d) of the Basel Protocol; article 2 (7) (d) and (9) of the Lugano Convention and article 2 (2) (d) (v) and (h) of the Kiev Protocol. Article 2 (f) of Annex VI of the Protocol on Environmental Protection to the Antarctic Treaty on Liability arising from environmental emergencies defines "Response action" as reasonable measures taken after an environmental emergency has occurred to avoid, minimize or contain the impact of that environmental emergency, which to that end may include clean-up in appropriate circumstances, and includes determining the extent of that emergency and its impact.

[355] See *Official Records of the General Assembly, Fifth-sixth Session, Supplement No. 10* (A/56/10), article 36, commentary, para. (15): "… environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs and property devaluation. Damage to such environmental values (biodiversity, amenity, etc. - sometimes referred to as 'non-use values') is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify".

[356] Report and Recommendations made by the Panel of Commissioners concerning the fifth Instalment of "F4" Claims, document S/AC.26/2005/10. See also Peter H. Sand, "Compensation for Environmental Damage …", *op. cit.*, p. 247. Elaborated in five instalment reports the awards recommended by F4 Panel and approved without change by the Governing Council add up to $5.26 billion, "the largest in the history of international environmental law", *ibid.*, p. 245. See also the guidelines for the follow-up Programs for Environmental Awards of UNCC, *Environmental Policy and Law*, vol. 35/6 (2005), pp. 276-281.

definition. It is however considered useful to offer a working definition for the purposes of the present draft principles. It helps to put into perspective the scope of the remedial action required in respect of environmental damage.[357]

(20) Environment could be defined in a restricted way, limiting it exclusively to natural resources, such as air, soil, water, fauna and flora, and their interaction. A broader definition could embrace environmental values also. The Commission has opted to include in the definition the latter encompassing non-service values such as aesthetic aspects of the landscape also.[358] This includes the enjoyment of nature because of its natural beauty and its recreational attributes and opportunities associated with it. This broader approach is justified by the general and residual character of the present draft principles.[359]

(21) Moreover, the Commission in taking such a holistic approach is, in the words of the International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project*:[360]

> mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[361]

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[357] See also European Communities Green Paper on remedying Environmental damage, COM (93) 47 final, 14 May 1993, p. 10.

[358] For a philosophical analysis underpinning a regimes for damage to biodiversity, see Michel Bowman, "Biodiversity, Intrinsic Value and the Definition and valuation of Environmental Harm" in Michael Bowman and Alan Boyle, *Environmental Damage ... op. cit.*, pp. 41-61. Article 2 of the 1972 Convention concerning the Protection of World Cultural and Natural Heritage defines "natural heritage" as "natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty".

[359] For a concise discussion of the differing approaches on the definition of environmental damage, see Philippe Sands, *Principles of Environmental Law* (Cambridge: CUP, 2003), second edition, pp. 876-878.

[360] *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports 1997*, p. 7.

[361] *Ibid.*, paras. 141-142. The Court in this connection also alluded to the need to keep in view the inter-generational and intra-generational interests and the contemporary demand to promote the concept of sustainable development.

(22) Furthermore, a broader definition would attenuate any limitation imposed by the remedial responses acceptable in the various liability regimes and as reflected in commentary in respect of subparagraphs (iv) and (v), above.

(23) Thus, the reference in paragraph (b) to "natural resources … and the interaction" of its factors embraces the idea of a restricted concept of environment within a protected ecosystem,[362] while the reference to "the characteristic aspects of the landscape" denotes an acknowledgement of a broader concept of environment.[363] The definition of natural resources covers living and non-living natural resources, including their ecosystems.

(24) Paragraph (c) defines hazardous activity by reference to any activity which has a risk of causing transboundary harm. It is understood that such risk of harm should be through its physical consequences, thereby excluding such impacts as may be caused by trade, monetary, socio-economic or fiscal policies. The commentary concerning the scope of application of these draft principles above has explained the meaning and significance of the terms involved.

(25) Paragraph (d) defines the State of origin. This means the State in the territory or otherwise under jurisdiction or control of which the hazardous activity is carried out. The term "territory", "jurisdiction", or "control" is understood in the same way as in the draft articles on prevention.[364] Other terms are also used for the purpose of the present principles. They include,

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[362] Under article 2 of the Convention on Biological Diversity, "ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit". Under CRAMRA:

> "Damage to the Antarctic environment or dependent or associated ecosystems means any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention."

[363] Article 2 (10) of the Lugano Convention contains a non-exhaustive list of components of the environment which includes: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape"; article 1 (c) of the Convention on the Transboundary Effects of Industrial Accidents refers to the adverse consequences of industrial accidents on "(i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); material assets and cultural heritage, including historical monuments"; article 1 (2) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes says that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

[364] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), commentary to draft article 1, paras. (7)-(10).

as defined under the draft articles on prevention, the "State likely to be affected" (a State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm) and there may be more than one such State likely to be affected in relation to any given situation of transboundary damage. The draft principles also use the term "States concerned" (the State of origin, any State affected and any State likely to be affected). "State affected" is not defined by the draft articles on prevention. For the purposes of the present draft principles it would be the States in whose territory, or in places under jurisdiction or control of which, damage occurs as a result of an incident concerning a hazardous activity in the State of origin. More than one State may be so affected. These terms have not been defined in the "Use of terms" for reasons of balance and economy.

(26) Paragraph (e) defines "transboundary damage". It refers to damage occurring in one State because of an accident or incident involving a hazardous activity with effect in another State. This concept is based on the well-accepted notions of territory, jurisdiction or control by a State. In that sense, it refers to damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the hazardous activities are carried out. It does not matter whether or not the States in question share a common border. This definition includes, for example, activities conducted under the jurisdiction or control of a State such as on its ships or platforms on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. However, it goes without stating that some other possibilities could also be involved, which may not be readily contemplated.

(27) The definition is intended to clearly identify and distinguish a State under whose jurisdiction or control an activity covered by these principles is conducted, from a State which has suffered the injurious impact.

(28) As is often the case with incidents falling within the scope of the present draft principles, there may be victims both within the State of origin and within the other States where damage is

suffered. In the disbursement of compensation, particularly in terms of the funds expected to be made available to victims as envisaged in draft principle 4 below, some funds may also be made available for damage suffered in the State of origin. Article XI of the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage envisages such a system.[365]

(29) Paragraph (f) defines "victim". The definition includes natural and legal persons, and includes the State as custodian of public property.[366] This definition is linked to and may be deduced from the definition of damage in paragraph (a) which includes damage to persons, property or the environment.[367] A person who suffers personal injury or damage or loss of property would be a victim for the purposes of the draft principles. A group of persons or commune could also be a victim. In the *Matter of the people of Enewetek* before the Marshall Islands Nuclear Claims Tribunal established under the 1987 Marshall Islands Nuclear Claims Tribunal Act, the Tribunal considered questions of compensation in respect of the people of Enewetek for past and future loss of use of the Enewetak Atoll; for restoration of Enewetak to a safe and productive state; for the hardships suffered by the people of Enewetak as a result of their relocation attendant to their loss of use occasioned by the nuclear tests conducted on the atoll.[368] In the *Amoco Cadiz* litigation, following the Amoco Cadiz supertanker disaster off Brittany, French Administrative departments of Côtes du Nord and Finistère and numerous municipalities called "communes", and various French individuals, businesses and associations

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[365] ILM vol. 36 (1997) 1473.

[366] On the contribution of Edith Brown-Weiss to the development of the concept of stewardship or trusteeship as striking a deep chord with Islamic, Judeo-Christian, African, and other traditions, and for the view that "some form of public trusteeships are incorporated in most legal systems" including the United Kingdom and India, see Roda Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences* (UBC Press, 2004), p. 18. See also Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (The Hague: Kluwer Law International, 2004), p. 424 for the role of public trust doctrine in India, Pakistan and Bangladesh.

[367] In respect of international criminal law, see the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985. See also the Rome Statute of the International Criminal Court, article 79.

[368] ILM vol. 39 (2000) 1214. In December 1947 the people were removed from Enewetak Atoll to Ujelang Atoll. At the time of removal, the acreage of the Atoll was 1,919.49 acres. On return on 1 October 1980, 43 tests of atomic devices had been conducted, at which time 815.33 acres were returned for use, another 949.8 acres were not available for use, and an additional 154.36 acres had been vaporized.

sued the owner of the Amoco Cadiz, and its parent company in the United States. The claims involved lost business. The French Government itself laid claims for recovery of pollution damages and clean-up costs.[369]

(30) The definition of victim is thus linked to the question of standing. Some liability regimes such as the Lugano Convention and the EU Directive 2004/35/CE on environmental liability provide standing for non-governmental organizations.[370] The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters also gives standing to NGOs to act on behalf of public environmental interests.[371] Victims may also be those designated under national laws to act as public trustees to safeguard those resources and hence the legal standing to sue. The concept of public trust in many jurisdictions provides proper standing to different designated persons to lay claims for restoration and clean-up in case of any transboundary damage.[372] For example, under the United States Oil Pollution Act, such a right is given to the United States Government, a State, an Indian tribe, and a foreign government. Under the United States Comprehensive Environmental Response, Compensation and Liability Act (CERCLA 1980), as amended in 1986 by the Superfund Amendments and Reauthorization Act, *locus standi* has been given only to the federal government, authorized representatives of States, as trustees of natural resources, or by designated trustees of Indian tribes. In some other jurisdictions, public authorities have been given similar right of recourse. Thus, Norwegian law provides standing to private organizations and societies to claim restoration costs. In France, some environmental associations have been given the right to claim compensation in criminal cases involving violation of certain environmental statutes. The Supreme Court of India has entertained petitions from individuals

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[369] See: *In the matter of the Oil Spill by the Amoco Cadiz off the coast of France on 16 March 1978*, United States Court of Appeals for the Seventh Circuit, 954 F.2d 1279. See also Maria Clara Maffei "The Compensation for Ecological Damage in the 'Patmos' case", ... *op. cit.*, p. 381.

[370] See article 18 of the Lugano Convention and article 12 of the EU Directive 2004/35/CE.

[371] For the text see ILM vol. 38 (1999), 517.

[372] Peter Wetterstein, "A Proprietary or Possessory Interest: ... *op. cit.*, pp. 50-51.

or groups of individuals under its well-developed public interest litigation (PIL) cases or class action suits to protect the environment from damage and has awarded compensation to victims of industrial and chemical pollution.[373]

(31) Paragraph (g) defines "operator". There is no general definition of operator under international law. The term however is employed in domestic law[374] and in treaty practice. In case of the latter, the nuclear damage regimes impose liability on the operator.[375] The definition of operator would however vary depending upon the nature of the activity. Channelling of liability on to one single entity, whether owner or operator is the hallmark of strict liability regimes. Thus, some person other than the operator may be specifically identified as liable depending on the interests involved in respect of a particular hazardous activity. For example, at the 1969 Conference leading to the adoption of the 1969 International Convention on Civil

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[373] Law Commission of India. One Hundred and Eighty-Sixth Report on Proposal to Constitute Environmental Courts. September 2003, p. 31, available at http://lawcommissionofindia.nic.in/reports. Articles 32 and 226 of the Constitution of India provide for writ jurisdiction of the Supreme Court and the High Courts of India in this regard. The Courts have also used article 21 of the Indian Constitution and expanded the meaning of "life" to include the "right to a healthy environment". See also Jona Razzaque, *Public Interest Environmental* ... *op. cit.*, pp. 314-315, 429, 443 where the author referred to arguments that the liberal standing provided before the Indian, Pakistan and Bangladesh courts to bring environmental causes of action have led to the immobility and inefficiency in administration as well as lead to the clogging of cases before the courts. This contribution is noteworthy for the overall assessment of progress made and reforms needed in the subcontinent to promote protection of environment.

[374] For domestic law see for example the 1990 Oil Pollution Act (OPA) of the United States, in which the following individuals may be held liable: (a) responsible party such as the owner or operator of a vessel, onshore and offshore facility, deepwater port and pipeline; (b) the "guarantor", the "person other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (c) third parties (individuals other than those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury). See also CERCLA (42 U.S.C.A. Section 9601 (2) (A)).

[375] 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the 2004 Protocol to amend the Convention on Third Party Liability in the Field of Nuclear Energy of the 1960 Convention (*operator of a nuclear installation*) (article 1, para. 2) and operator in respect to a nuclear installation refers to the person designated by the competent public authority as the operator of the installation (article 1 (vi)); the 1963 Vienna Convention on Civil Liability for Nuclear Damage (operator) (article IV); 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage ("operator") (article 1 (c)); the 1962 Convention on the Liability of Operators of Nuclear Ships (*operator of nuclear ships*) (article II).

Liability for Pollution Damage, the possibility existed to impose the liability on the shipowner or the cargo owner or both.[376] However under a compromise agreed, the shipowner was made strictly liable.[377]

(32) The draft principles envisage the definition of "operator" in functional terms and it is based on a factual determination as to who has use, control, and direction of the object at the relevant time. Such a definition is generally in conformity with notions obtaining at civil law.[378] More generally, while no basic definition of the operator has been developed, "recognition has been gained for the notion that by operator is meant one in actual, legal or economic control of the polluting activity".[379]

(33) The term "command" connotes an ability to use or control some instrumentality. Thus it may include the person making use of an aircraft at the time of the damage, or the owner of the aircraft if he retained the rights of navigation.[380] It should be clear however that the term "operator" would not include employees who work or are in control of the activity at the relevant time.[381] The term "control" denotes power or authority to manage, direct, regulate, administer or

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[376] See LEG/CONF/C.2/SR.2-13, cited in David W. Abecassis and Richard L. Jarashow, *Oil Pollution from Ships* (London: Steven and Sons: 1985) 2nd ed., p. 253. Some regimes that attach liability to the ship owner are the 1992 International Convention on Civil Liability for Pollution Damage (Article III, para. 1); the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (article III); the 1996 International Convention for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (article 7, para. 1).

[377] Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels defines "carrier" with respect to inland navigation vessel as "the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods are carried" (article 1, para. 8); the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources defines operator of a continental shelf installation to include in the absence of a designation by a Contracting Party the person who is in overall control of the activities carried on at the installation (article 1, para. 2); and under the EU Directive 2004/35/CE on environmental liability, which attaches liability on the *operator*, the term operator includes any natural or legal, private or public person who operates or controls the occupational activity.

[378] See Elspeth Reid, "Liability for Dangerous Activities: A Comparative Analysis", ICLQ, vol. 48 (1999), pp. 731-756, p. 755.

[379] See Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (The Hague: Kluwer Law International, 1999), p. 401.

[380] 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, article 12.

[381] See Article 2 (c) of the annex VI on Liability Arising from Environmental Emergencies concluded in June 2005 which states that "'operator' means any natural and juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor or subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organizes activities to be carried out in the Antarctic Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator." For the text, see www.aad.gov.au.

oversee.[382] This could cover the person to whom decisive power over the technical functioning of an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.[383] It may also include a parent company or other related entity, whether corporate or not, particularly if that entity has actual control of the operation.[384] An operator may be a public or private entity. It is envisaged that a State could be an operator for purposes of the present definition.

(34) The phrase "at the time of the incident" is intended to establish a connection between the operator and the transboundary harm. The looser and less concrete the link between the incident in question and the property claimed to have been damaged, the less certain the right to get compensation.

Principle 3

Purposes

The purposes of the present draft principles are:

(*a*) to ensure prompt and adequate compensation to victims of transboundary damage; and

(*b*) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

Commentary

(1) The two-fold purpose of the present draft principles is to ensure protection to victims suffering damage from transboundary harm and to preserve and protect the environment *per se* as common resource of the community.

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[382] The definition of ship owner in the Bunker Oil Convention is broad. It includes the registered owner, bareboat charterer, manager and operator of the ship (article 1, para. 2).

[383] EU Directive on Environmental Liability, article 1, para. 6.

[384] Under article 8 of the CRAMRA, the primary liability lies with the *operator*, which is defined as a Party or an agency or instrumentality of a Party or a juridical person established under the law of a Party or a joint venture consisting exclusively of any combination of the aforementioned Article 1 (11). Pursuant to section 16.1 of the Standard clauses for exploration contract annexed to the Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority on 13 July 2000, the *Contractor* is liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them ISBA/6/A/18, annex, clause 16.

(2) The purpose of ensuring protection to victims suffering damage from transboundary harm has been an essential element from the inception of the topic by the Commission. In his schematic outline, Robert Q. Quentin-Baxter focused on the need to protect victims, which required "measures of prevention that as far as possible avoid a risk of loss or injury and, insofar as possible, measures of reparation" and that: " ... an innocent victim should not be left to bear loss or injury; ... ".[385] The former consideration is already addressed by the draft articles on prevention.

(3) The notion of prompt and adequate compensation in paragraph (a) reflects the understanding and the desire that victims of transboundary damage should not have to wait long in order to be compensated. The importance of ensuring prompt and adequate compensation to victims of transboundary damage has its underlying premise in the *Trail Smelter* arbitration[386] and the *Corfu Channel* case,[387] as further elaborated and encapsulated in Principle 21 of the Stockholm Declaration, namely:

> States have, in accordance with the Charter of the United Nations and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment or other areas beyond the limits of national jurisdiction.

(4) The notion of liability and compensation for victims is also reflected in Principle 22 of the Stockholm Declaration, wherein a common conviction is expressed that:

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[385] *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360*, para. 53, section 3 (paras. 2 and 3).

[386] *Trail Smelter Arbitration*, UNRIAA, vol. III, p. 1905 at p. 1965 stated:

> "[U]nder the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence."

[387] *Corfu Channel case* (Merits) *I.C.J. Reports 1949*, p. 4 at p. 22: The Court stated that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".

> "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."[388]

(5) This is further addressed more broadly in Principle 13 of the Rio Declaration:

> "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

While the principles in these Declarations are not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community.[389]

(6) Paragraph (b) gives a prominent place to the protection and preservation of the environment and to the associated obligations to mitigate the damage and to restore or reinstate the same to its original condition to the extent possible. Thus, it emphasizes the more recent concern of the international community to recognize protection of the environment *per se* as a value by itself without having to be seen only in the context of damage to persons and property. It reflects the policy to preserve the environment as a valuable resource not only for the benefit of the present generation but also for future generations. In view of its novelty and the common interest in its protection, it is important to emphasize that damage to environment *per se* could constitute damage subject to prompt and adequate compensation, which includes reimbursement of reasonable costs of response and restoration or reinstatement measures undertaken.

(7) The aim is not to restore or return the environment to its original state but to enable it to maintain its permanent functions. In the process it is not expected that expenditures

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[388] *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14).

[389] Birnie and Boyle, *International Law ... op. cit.* at p. 105 that "[t]hese principles all reflect more recent developments in international law and State practice; their present status as principles of general international law is more questionable; but the evidence of consensus support provided by the Rio Declaration is an important indication of their emerging legal significance".

disproportionate to the results desired would be incurred and such costs should be reasonable. Where restoration or reinstatement of the environment is not possible, it is reasonable to introduce the equivalent of those components into the environment.[390]

(8) In general terms, as noted above in the commentary on the "Use of terms" with respect to subparagraphs (iii)-(v), the earlier reluctance to accept liability for damage to environment *per se*, without linking such damage to damage to persons or property[391] is gradually disappearing.[392] In the case of damage to natural resources or the environment there is a right of

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[390] For analysis of the definition of environment and the compensable elements of damage to environment see Barboza, Eleventh Report on International liability, document A/CN.4/468, pp. 1-17, at para. 28, p. 12. For an interesting account of the problem of damage, definition of harm, damage, adverse effects and damage valuation, see M. A. Fitzmaurice, International Protection of the Environment, *Recueil des Cours* ... vol. 293 (2001) pp. 225-233.

[391] For contrasting results see *Blue Circle Industries Plc v. Ministry of Defence*, [1998] 3 All ER and, *Merlin v. British Nuclear Fuels, Plc*, [1990] 3 All ER 711.

[392] For difficulties involved in claims concerning ecological damage and prospects, see the *Patmos* and the *Haven cases*, see generally, Andrea Bianchi, "Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law, ... " op cit., p. 103 at 113-129. See also Maria Clara Maffei "The Compensation for Ecological Damage in the 'Patmos' case", ... *op. cit.*, p. 381 at 383-390; and David Ong, "The Relationship between Environmental Damage and Pollution: Marine Oil Pollution Laws in Malaysia and Singapore", in Bowman and Boyle, *Environmental Damage* ... *op. cit.*, p. 191 at 201-204. See also Sands, "*Principles* ... " *op. cit.*, ... pp. 918-922. See also the 1979 *Antonio Gramsci* incident and the 1987 *Antonio Gramsci* incident happened on 6 February 1987, see generally, Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (The Hague: Kluwer Law International, 1996), pp. 365-366: The IOPC Fund resolution number 3 of 1980, did not allow the court to assess compensation to be paid by the Fund "*on the basis of an abstract quantification of damage calculated in accordance with theoretical models*". In the *Amoco Cadiz*, the Northern District Court of Illinois ordered Amoco Oil Corporation to pay $85.2 million in fines - $45 million for the costs of the spill and $39 million in interest. It denied compensation for non-economic damage. It thus dismissed claims concerning lost image and ecological damage. It noted: "It is true that the commune was unable for a time to provide clean beaches for the use of its citizens, and that it could not maintain the normal peace, quiet, and freedom from the dense traffic which would have been the normal condition of the commune absent the cleanup efforts", but concluded that the "loss of enjoyment claim by the communes is not a claim maintainable under French law". Maria Clara Maffei "The Compensation for Ecological Damage in the 'Patmos' case", Francioni and Scovazzi, *International Responsibility* ... " *op. cit.*, p. 381 at 393. Concerning lost image, the Court observed that the plaintiffs claim is compensable in measurable damage, to the extent that it can be demonstrated that this loss of image resulted in specific consequential harm to the commune by virtue of tourists and visitors who might otherwise have come staying away. Yet this is precisely the subject matter of the individual claims for damages by hotels, restaurants, campgrounds, and other businesses within the communes. As regards ecological damage, the Court dealt with problems of evaluating "the species killed in the intertidal zone by the oil spill" and observed that "this claimed damage is subject to the principle of res nullius and is not compensable for lack of standing of any person or entity to claim therefore", ibid., at 394. See also in the Matter of the People of Enewetek ILM vol. 39 (2000), p. 1214 at 1219, before the Marshall Islands Nuclear Claims Tribunal, the Tribunal had an opportunity to consider whether restoration was an appropriate remedy for loss incurred by the people of the Enewetak atoll arising from nuclear tests conducted by the United States. It awarded clean-up and rehabilitation costs as follows: $22.5 m for soil removal; $15.5 m for potassium treatment; $31.5 m for soil disposal (causeway); $10 m for clean-up of plutonium; $4.51 m for surveys; and $17.7 m for soil rehabilitation and revegetation.

compensation or reimbursement for costs incurred by way of reasonable preventive, restoration or reinstatement measures. This is further limited in the case of some conventions to measures *actually* undertaken, excluding loss of profit from the impairment of the environment.[393]

(9) The State or any other public agency which steps in to undertake response or restoration measures may recover the costs later for such operations from the operator. For example, such is the case under the US Comprehensive Environmental Response, Compensation and Liability Act, 1980 (CERCLA or Superfund). The Statute establishes the Superfund with tax dollars to be replenished by the costs recovered from liable parties, to pay for clean-ups if necessary. The United States Environmental Agency operates the Superfund and has the broad powers to investigate contamination, select appropriate remedial actions, and either order liable parties to perform the clean-up or do the work itself and recover its costs.[394]

(10) In addition to the present purposes, the draft principles serve or imply the serving of other objectives, including: (a) providing incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) resolving disputes among States concerning transboundary damage in a peaceful manner that promotes friendly relations among States; (c) preserving and promoting the viability of economic activities that are important to the welfare of States and peoples; (d) and providing compensation in a manner that is predictable, equitable, expeditious and cost effective. Wherever possible, the draft principles should be interpreted and applied so as to further all these objectives.[395]

(11) In particular, the principle of ensuring "prompt and adequate" compensation by the operator should be perceived from the perspective of achieving "cost internalization", which constituted the core, in its origins, of the "polluter-pays" principle. It is a principle that argues for internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself. It thus attempted to ensure that

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[393] See general commentary to draft Principle 2.

[394] For an analysis of CERCLA, see Brighton and Askman, "The Role of the Government Trustees in Recovering Compensation for Injury to Natural Resources", in Peter Wetterstein (ed.), *Harm to the Environment ... op. cit.*, pp. 177-206, 183-184.

[395] See also Lucas Bergkamp, *Liability and Environment: ... op. cit.*, p. 70, footnote 19, who has identified seven functions relevant to a liability regime, namely compensation, distribution of losses, allocation of risks, punishment, corrective justice, vindication or satisfaction, and deterrence and prevention.

Governments did not distort the costs of international trade and investment by subsidizing these environmental costs. This policy was endorsed in the policy of OECD and the European Union. The contexts in which the principle was endorsed have envisaged its own variations in its implementation.

(12) In one sense, it seeks to provide an incentive on the operator and other relevant persons or entities to prevent a hazardous activity from causing transboundary damage. The "polluter-pays" principle is referred to in a number of international instruments. It appears in very general terms as Principle 16 of the Rio Declaration:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

(13) In treaty practice, the principle has formed the basis for the construction of liability regimes on the basis of strict liability. This is the case with the Lugano Convention which in the preamble has "regard to the desirability of providing for strict liability in this field taking into account the 'Polluter-Pays' Principle". The 2003 Kiev Protocol, in its preamble, refers to the "polluter-pays principle" as "a general principle of international environmental law, accepted also by the parties to" the 1992 Protection and Use of Watercourses Convention and Lakes and the 1992 Industrial Accidents Convention.[396] National jurisdictions have also placed reliance on it as playing a remedial and compensatory function.[397]

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[396] It also finds reference, for example, in the 1990 International Convention on Oil Pollution Preparedness and Response (ILM vol. 30 (1990) p. 735); the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention); (ILM vol. 32 (1993), p.1069); the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area; the 1992 Convention on the Protection of the Marine Environment of the Black Sea against Pollution (ILM vol. 32 (1993) p. 1110); the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; the 1992 Convention on the Transboundary Effects of Industrial Accidents and the 1993 Lugano Convention, and the EU Directive 2004/35/CE on environmental liability.

[397] In its report on the Implementation of Agenda 21, the United Nations notes:

> "Progress has been made in incorporating the principles contained in the Rio Declaration … - including … the polluter-pays principle … - in a variety of international and national legal instruments. While some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice."

Official Records of the General Assembly, Nineteenth Special Session, Supplement No. 2 (A/S-19/33), para. 14.

(14) The principle has its limitations. It has thus been noted:

> "The extent to which civil liability makes the polluter pay for environmental damage depends on a variety of factors. If liability is based on negligence, not only does this have to be proved, but harm which is neither reasonably foreseeable nor reasonably avoidable will not be compensated and the victim or the taxpayer, not the polluter, will bear the loss. Strict liability is a better approximation of the 'polluter-pays' principle, but not if limited in amount, as in internationally agreed schemes involving oil tankers or nuclear installations. Moreover, a narrow definition of damage may exclude environmental losses which cannot be easily quantified in monetary terms, such as wildlife, or which affect the quality of the environment without causing actual physical damage."[398]

However, the polluter-pays principle has been endorsed or is being endorsed in different national jurisdictions. The Indian Supreme Court in the *Vellore Citizens' Welfare Forum v. Union of India*, 1996 (5) SCC 647, noted that precautionary principle, and the polluter-pays principle, and the new burden of proof, supported by articles 21, 47, 48A, and 51A (g) of the Constitution of India, have become "part of the environmental law of the country". Report of the Indian Law Commission, see Law Commission of India, One Hundred Eighty-Sixth Report on Proposal to Constitute Environment Courts, September 2003. Access to justice, particularly in environmental matters is an essential facet of article 21 of the Indian Constitution. New Zealand and Australia already have environmental courts. Available at: http://lawcommissionofindia.nic.in/reports>, p. 36. Multiple provincial statutes of Canada regarding liability for environmental damage and subsequent remediation recognize the principle. In Spain, the Spanish courts have relied on the principle *cuius est commodum eius est incommodum*, that is the person who derives a benefit from an activity must also pay for resulting damage, to impose liability on persons for damage caused by mines, waste, damage as a result of loss of water, and toxic gas. In Japan, with regard to pollution caused by mining activities and marine pollution, the polluter pays to clean up the contamination to the commons and to restore the victim's property to its pre-damage state. The French legal system endorsed in various forms the polluter-pays principle. In *Epoux Vullion v. Société Immobilière Vernet-Chritophe*, JCP 1971.2.16781, France's *Cour de Cassation* held that "the owner's right to enjoy his property in the most absolute manner not prohibited by law or regulation is subject to his obligation not to cause damage to the property of anyone else which exceeds the normal incommodities of neighborhood". The Swedish Environmental Code, 1998, which came into force on 1 January 1999 makes the party who is liable, to a reasonable extent, for pollution to pay for investigations of possible pollution, clean-up, and mitigation of damage. The test of reasonableness is determined with reference to (a) the length of time elapsed since the pollution occurred, (b) environmental risk involved, (c) the operator's contribution. Ireland enacted statutes to integrate, into domestic law, intentional treaties imposing strict liability for oil and hazardous waste spills by ships. Irish Courts have already begun to rely upon the polluter-pays principle. In Brazil strict liability is becoming a standard for damage caused by activities which are hazardous or those that harm or have a risk of causing harm to the environment. Intent need not be proved. Under the National Environmental Management Act, 1998, of South Africa strict liability is imposed on operators who may cause or have caused or are causing significant pollution or degradation of environmental harm. Singapore provides strict liability for criminal offences. It imposes obligations of clean-up on polluters without the need for any intentional or negligent behaviour. See also Secretariat Survey of Liability regimes, A/CN.4/543, paras. 272-286.

[398] Birnie and Boyle, *International Law … op. cit.*, pp. 93-94.

(15) Moreover, it has been asserted that the principle cannot be treated as a "rigid rule of universal application, nor are the means used to implement it going to be the same in all cases".[399] Thus, a "great deal of flexibility will be inevitable, taking full account of differences in the nature of the risk and the economic feasibility of full internalization of environmental costs in industries whose capacity to bear them will vary".[400] Some commentators doubt "whether it (the 'polluter-pays' principle) has achieved the status of generally applicable rule of customary international law, except perhaps in relation to States in the EC, the UNECE, and the OECD".[401]

(16) The aspect of promptness and adequacy of compensation is related to the question of measurement of compensation. General international law does not specify "principles, criteria or methods of determining *a priori* how reparation is to be made for injury caused by wrongful acts

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[399] *Ibid.*, pp. 94-95. See also Secretariat Survey of Liability regimes, A/CN.4/543, chapter II.

[400] Birnie and Boyle, *International law … op. cit.*, p. 95. The authors noted that reference to "public interest" in Principle 16 of the Rio Declaration leaves "ample room", for exceptions and as adopted at Rio the principle "is neither absolute nor obligatory" p. 93. They also noted that in the case of the East European nuclear installations, the Western European Governments, who represent a large group of potential victims, have funded the work needed to improve the safety standards, p. 94.

[401] Philippe Sands, *Principles … op. cit.*, p. 282. For illustration of the flexible way in which this principle is applied in the context of OECD and EC, pp. 281-285. Rudiger Wolfrum, notes that "Although the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 and the Convention on the Transboundary Effects of Industrial Accidents both refer in their Preambles to the polluter-pays principle as being a "general principle of international environmental law", such view is not sustained in the light of the United States' practice and also in the light of the uncertainties about its scope and consequences", see Rudiger Wolfrum "Transboundary Pollution" in Fred L. Morrison and Rudiger Wolfrum (eds.) *International, Regional, and National Environmental Law … op. cit.* See generally Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: OUP, 2002), pp. 21-59.

In the arbitration between France and the Netherlands, concerning the application of the Convention of 3 December 1976 on the Protection of the Rhine against Pollution and the Additional Protocol of 25 September 1991 against Pollution from Chlorides (France/Netherlands), the Arbitral Tribunal was requested to consider the "polluter-pays" principle in its interpretation of the Convention, although it was not expressly referred to therein. The Tribunal in its award dated 12 March 2004 concluded that, despite its importance in treaty law, the polluter-pays principle is not a part of general international law, and was therefore not pertinent to its interpretation of the Convention. Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 Septembre 1991 Additionel à la Convention relative à la Protection du Rhin contre la pollution par les chrorures du 3 December 1976. The Tribunal, stated, in pertinent part in para. 102-103:

> "102 … Le tribunal note que les Pays-Bas, à l'appui de leur demande ont fait référence au principe du 'polluer payeur'."
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> 103. Le Tribunal observe que ce principe figure dans certains instruments internationaux, tant bilatéraux que multilatéraux, et se situe à des niveaux d'effectivité variables. Sans nier son importance en droit conventionnel, le Tribunal ne pense pas que ce principe fasse partie du droit international général."
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> Arbitral Award of 12 March 2004, available at http://www.pca-cpa.org.

or omissions".[402] Reparation under international law is a consequence of a breach of a primary obligation. The general obligation to make full reparation is restated in article 31 of the articles on responsibility of States for internationally wrongful acts.[403] The content of this obligation was detailed by the Permanent International Court of Justice in the *Chorzow Factory case*, when it stated *obiter dicta*:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which is not covered by restitution in kind or payment in place of it - such are the principles which should serve the amount of compensation due for an act contrary to international law."[404]

(17) The *Chorzow Factory* standard applies in respect of internationally wrongful acts, which are not covered by the present draft principles. It is however useful in appreciating the limits and the parallels that ought to be drawn in respect of activities covered by the present draft principles. There are questions about principles on the basis of which compensation could be awarded: Should compensation be awarded only in respect of the actual loss suffered by the victim to the extent it can be quantified? Or should compensation go beyond that and reflect the paying capacity of the operator? Two Guiding Principles seem relevant. The first is that

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[402] Garcia-Amador, Sohn and Baxter (eds.), *Recent Codification of the Law of State Responsibility for Injury to Aliens* (Dobbs Ferry, NY), 1974, 89. See also Alan Boyle, "Reparation for Environmental Damage in International Law: Some Preliminary Problems", in Bowman and Boyle, *Environmental Damage ... op. cit.*, pp. 17-26. Julio Barboza, Special Rapporteur, Eleventh report, document A/CN.4/468 (1995).

[403] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), article 31 and its commentary.

[404] *Chorzow Factory, Jurisdiction, P.C.I.J., 1927*, Series A, No. 9, p. 21.

damages awarded should not have a punitive function.[405] The second is that the victim can only be compensated for the loss suffered but cannot expect to financially gain from the harm caused.[406] While keeping in view these two basic principles, the point can still be made that equity, as well as polluter-pays principle, demands that the operator should not be allowed to seek out safe-havens to engage in risk-bearing hazardous activities without expecting to pay for damage caused, so as to provide an incentive to exert utmost care and due diligence to prevent damage in the first instance.[407]

(18) Some general principles concerning payment of compensation have evolved over a period of time and were endorsed by the International Court of Justice and other international tribunals. These may be briefly noted:[408] (a) financially assessable damage, that is, damage quantifiable in monetary terms is compensable; (b) this includes damage suffered by the State to its property, or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage; as well as damage suffered by natural or legal persons, both nationals and those who are resident and suffered injury on its territory; (c) the particular circumstances of the case, the content of the obligation breached, the assessment of reasonableness of measures undertaken by parties in respect of the damage caused, and finally, consideration of equity and mutual accommodation. These factors will determine the terms or heads against which precise sums of compensation would be payable. Accordingly, the following guidelines on the basis of awards rendered by international courts and tribunals may be noted:[409] compensation is payable in respect of personal injury, for directly associated material loss such as loss of earnings and earning capacity, medical expenses including costs for achieving full rehabilitation;

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[405] See B. Graefrath, "Responsibility and Damage Caused: Relationship Between Responsibility and Damages", *Recueil des Cours* ... 1984-II, vol. 185 (1985), pp. 9-150, pp. 100-102. *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), Responsibility of States for internationally wrongful acts adopted by the Commission in 2001, article 36 and its commentary.

[406] For the principles stated in the "*Lusitania*" case and the *Factory at Chorzow case* on the function of compensation, see, *ibid*., article 36 and its commentary.

[407] The Supreme Court of India in the *M.C. Mehta v. Union of India* (the Oleum gas leak case) (1987 SC 1086) stressed the point that the "larger and more prosperous the enterprise, greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise". See Law Commission of India, One Hundred Eighty-Sixth Report on Proposal to Constitute Environmental Courts, September 2003, p. 31, available at http://lawcommissionofindia.nic.in/reports.

[408] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), article 36, its commentary and the cases cited therein.

[409] *Ibid*., and the cases cited therein.

compensation is also payable for non-material damage suffered as, for example, for "loss of loved ones, pain and suffering as well as the affront to sensibilities associated with the intrusion on the person, home or private life".[410]

(19) In respect of damage to property, the loss is usually assessed against capital value, loss of profits, and incidental expenses. In this context, different valuation techniques and concepts like assessment of "fair market value", "net book value", "liquidation or dissolution value", "discounted cash flow" factoring elements of risk and probability have been used. On these and other issues associated with quantification of compensation there is ample material, particularly in the context of injury caused to aliens and their property through nationalization of their companies or property.[411]

(20) The principles developed in the context of disputes concerning foreign investment may not automatically be extended to apply to the issues of compensation in the field of transboundary damage. There may be difficult questions regarding claims eligible for compensation, as for example, economic loss, pain and suffering, permanent disability, loss of amenities or of consortium, and the evaluation of the injury. Similarly, damage to property, which could be repaired or replaced could be compensated on the basis of the value of the repair or replacement. It is difficult to compensate damage caused to objects of historical or cultural value, except on the basis of arbitrary evaluation made on a case-by-case basis. Further, the looser and less concrete the link between the incident in question with the property claimed to have been damaged, the less certain the right to get compensation. The Commentary to draft Principle 2 reveals the extent to which some of these problems have been overcome.

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[410] *Ibid*., para. (16). See also Vinod Shankar Misra, "Emerging Right to Compensation in Indian Environmental Law", *Delhi Law Review*, vol. 23 (2001), pp. 58-79.

[411] R. Doak Bishop, James Crawford, W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials, and Commentary* (The Hague: Kluwer Law International, 2005), chap. VII on methods for valuing losses, pp. 1331-1372. Also see, C.F. Amerasinghe, "Issues of Compensation for the Taking of an Alien Property in the light of recent Cases and Practice", ICLQ, vol. 41 (1992), pp. 22-65.

Principle 4

Prompt and adequate compensation

1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.

Commentary

(1) This draft principle reflects an important role that is envisaged for the State of origin in fashioning a workable system for compliance with the principle of "prompt and adequate compensation". The reference to "Each State" in the present context is to the State of origin. The principle contains four interrelated elements: (a) the State should ensure prompt and adequate compensation and for this purpose should put in place an appropriate liability regime; (b) any such liability regime may place primary liability on the operator, and should not require the proof of fault; (c) any conditions, limitations or exceptions that may be placed on such liability should not defeat the purpose of the principle of prompt and adequate compensation; and (d) various forms of securities, insurance and industry-wide funding are the means to provide sufficient financial guarantees for compensation. The five paragraphs of draft principle 4 express these four elements.

(2) It should be recalled that the assumption under the present draft principles is that the State of origin would have performed fully all the obligations concerning prevention of

transboundary activities under international law. Without prejudice to other claims that may be made under international law, the responsibility of the State for damage in the context of present principles is therefore not contemplated.

(3) Thus paragraph 1 focuses on the principle that States should ensure payment of adequate and prompt compensation. The State itself is not necessarily obliged to pay such compensation. The principle, in its present form, responds to and reflects a growing demand and consensus in the international community: as part of arrangements for permitting hazardous activities within its jurisdiction and control, it is widely expected that States would make sure that adequate mechanisms are also available to respond to claims for compensation in case of any damage.

(4) The emphasis in paragraph 1 is on all "necessary measures" and each State is given sufficient flexibility to achieve the objective, that is, of ensuring prompt and adequate compensation. This is highlighted without prejudice to any *ex gratia* payments to be made or contingency and relief measures, States or other responsible entities may otherwise consider extending to the victims.

(5) As noted in the commentary concerning the "Purposes" of the present draft principles, the need to develop liability regimes in an international context has been recognized and finds expression, for example, in Principle 22 of the Stockholm Declaration of 1972 and Principle 13 of the Rio Declaration of 1992.[412]

(6) The basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities could be traced back as early as the *Trail Smelter* Arbitration, a case in which clear and convincing evidence was available for the serious consequence and injury caused to property within one State by the iron ore smelter in another. Since then numerous treaties, some important decisions, and extensive national law and practice

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[412] See also the 2000 *Malmö* Declaration and the 2001 Montevideo Programme III approved and adopted by decision 21/23 of the 21st session of the UNEP Governing Council and the Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/20, resolution 2 of 2 September 2002, annex.

which have evolved have given considerable weight to claims for compensation in respect of transfrontier pollution and damage. Some commentators regard this as a customary law obligation.[413]

(7) The standard of promptness and adequacy in paragraph 1 is a standard that also finds support in the *Trail Smelter* Arbitration.[414] The notion of "promptness" refers to the procedures that would govern access to justice, and that would influence the time and duration for the rendering of decisions on compensation payable in a given case. This is also a necessary criterion to be emphasized in view of the fact that litigation in domestic courts involving claims of compensation could be costly and protracted over several years, as it was in the *Amoco Cadiz* case, which took 13 years.[415] To render access to justice more

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[413] For a mention of different sources as a basis for arriving at this conclusion, see Peter-Tobias Stoll, "Transboundary Pollution" in Fred L. Morrison and Rudiger Wolfrum (eds.) *International, Regional, and National Environmental Law ... op. cit.*, pp. 169-200, pp. 169-174. Peter-Tobias Stoll notes:

> "It must be recalled, however, that the prohibition principle is based on sovereign right of states to their territory. There is no evidence that it is necessary to refer to a specific entitlement based on a single component in raising a complaint about transboundary pollution. One can thus conclude that the prohibition of transboundary pollution is based on the state interest in the environmental integrity of its territory. Treaty law reflects this notion ... Sovereignty, while creating a right to the environmental integrity of a territory or area at one hand, at the other hand is the very basis of states' responsibility for the pollution which originates within their territory."

In addition, it is also suggested that principles of abuse of rights and good neighbourhood have provided a basis for the prohibition against transboundary harm. See Johan G. Lammers, "Transfrontier Pollution and International Law, The Present State of Research" in The Hague Academy of International Law, Center For Studies and Research in International Law and International Relations, *Transfrontier Pollution and International Law* (1986), p. 100.

[414] See Principle 10 of the Rio Declaration, and article 235 (2) of the 1982 United Nations Convention on the Law of the Sea, in article 2 (1) of the 1996 Helsinki articles on international watercourses, prepared by the International Law Association and in human rights law precedents. See also Alan E. Boyle, "Globalizing Environmental Liability: the Interplay of National and International Law", *Journal of Environmental Law*, vol. 17 (2005), pp. 3-26, p. 18.

[415] Emmanuel Fontaine, "The French Experience: 'Tanio' and 'Amoco Cadiz' incidents compared" in Colin M. De La Rue, *Liability for Damage to the Environment* (London: Lloyds of London Press, 1993), pp. 101-108, p. 105. Similarly, in the case of Bhopal gas tragedy, it is stated that by the time the case first reached the Supreme Court of India on the issue whether interim relief assessed against Union Carbide on behalf of victims was appropriate, litigation continued in India for more than five years without even reaching the commencement of pretrial discovery, see Kenneth F. McCallion and H. Rajan Sharama, "International Resolution of Environmental Disputes and Bhopal Catastrophe" in The International Bureau of the Permanent Court of Arbitration (eds.) *International Investments and Protection of the Environment* (The Hague: Kluwer Law International, 2001), pp. 239-270, p. 249. It is also stated that *Trail Smelter* Arbitration took about 14 years to adjudicate upon the claims of private parties. See Philip McNamara, *The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury* (Alfred Metzener Verlag, Frankfurt, 1981), p. 70.

widespread, efficient and prompt, suggestions have been made to establish special national or international environmental courts.[416]

(8) On the other hand, the notion of "adequacy" of compensation refers to any number of issues.[417] For example, a lump-sum amount of compensation agreed upon as a result of negotiations between the operator or the State of origin and the victims or other concerned States following the consolidation of claims of all the victims of harm may be regarded as an adequate compensation. So would compensation awarded by a Court as a result of the litigation entertained in its jurisdiction, subject to confirmation by superior courts wherever necessary. It is *ipso facto* adequate as long as the due process of the law requirements are met. As long as compensation given is not arbitrary, and grossly disproportionate to the damage actually suffered, even if it is less than full, it can be regarded as adequate. In other words, adequacy is not intended to denote "sufficiency".

(9) The term "its territory or otherwise under its jurisdiction or control" has the same meaning as the terms used in paragraph 1 (a) of article 6 of the draft articles on prevention.[418]

(10) Paragraph 2 spells out the first important measure that may be taken by each State, namely the imposition of liability on the operator or, where appropriate, other person or entity. The draft principles envisage the definition of "operator" in functional terms and it is based on the factual determination as to who has the use, control, and direction of the object at the relevant

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[416] A. Rest "Need for an International Court for Environment? Underdeveloped Legal Protection for the Individual in Transnational Litigation", Environmental Policy and Law, vol. 24, (1994), pp. 173-187. For the view that the establishment of an international environmental court may not be a proper answer to the "need to enhance the rule of law through access to justice and the representation of community interests", see Ellen Hey, "Reflections in an International Environmental Court" in The International Bureau of the Permanent Court of Arbitration (eds.), *International Investments ... op. cit.*, pp. 271-301, at p. 299-300. At the national level, the Indian Law Commission, made a very persuasive case for the establishment of national environmental courts in India. See Law Commission of India, *op. cit.* New Zealand and Australia already have environmental courts. Available at: http://lawcommissionofindia.nic.in/reports>.

[417] For an exhaustive enumeration of the implementation of the principle of prompt, adequate and effective compensation in practice, see Rene Lefeber, *Transboundary Environmental Interference ..., op. cit.*, ch. 7, pp. 229-312.

[418] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), article 1 and commentary paras. (7)-(12).

time. It is worth stressing that liability in case of significant damage is generally channelled[419] to the operator of the installation. There are however other possibilities that exist. In the case of ships, it is channelled to the owner, not the operator. This means that charterers - who may be the actual operators - are not liable under the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992. In other cases, liability is channelled through more than one entity. Under the Basel Protocol, waste generators, exporters, importers and disposers are all potentially liable at different stages in the transit of waste. The real underlying principle is not that "operators" are always liable, but that the party with the most effective control of the risk at the time of the accident or has the ability to provide compensation is made primarily liable.

(11) Operator's liability has gained ground for several reasons and principally on the belief that one who created high risks seeking economic benefit must bear the burden of any adverse consequences of controlling the activity.[420] The imposition of the primary liability on the operator is widely accepted in international treaty regimes and in national law and practice.[421]

(12) The second sentence of the paragraph 2 provides that such liability should not require proof of fault. Various designations are used to describe contemporary doctrine imposing strict liability, among them: "liability without fault" (*responsabilité sans faute*); "negligence without fault", "presumed responsibility", "fault *per se*", "objective liability" (*responsabilité objective*) or risk liability (*responsabilité pour risqué crée*).[422] The phrase "such liability should not require proof of fault" seeks to capture such a broad spectrum of designations.

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[419] According to Goldie, the nuclear liability conventions initiated the new trend of channelling liability back to operator "no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones)". See L.F.E. Goldie, "Concepts of Strict and Absolute Liability and the Ranking of Liability in terms of Relative Exposure to Risk", *Netherlands Yearbook of International Law* vol. XVI (1985) pp. 174-248 at p. 196. See also Goldie, "Liability for Damage and the Progressive Development of International Law", ICLQ vol. 14 (1965), p. 1189, pp. 1215-8.

[420] For an interesting account on economic, political and strategic factors influencing the choices made in channelling liability, see Gunther Doeker and Thomas Gehring "Private or International Liability for Transnational Environmental Damage - The Precedent of Conventional Liability Regimes", *Journal of Environmental Law*, vol. 2 (1990), pp. 1-15, p. 7.

[421] See Secretariat Survey of Liability regimes, A/CN.4/543, paras. 340-386.

[422] See Ferdinard F. Stone, "Liability for damage caused by things", in Andree Tunc (ed.), International Encyclopedia of Comparative Law, Vol. XI, Torts, part I (The Hague, Nijhoff, 1983), chap. 5, p. 3, para. 1.

(13) Hazardous and ultrahazardous activities, the subject of the present draft principles, involve complex operations and carry with them certain inherent risks of causing significant harm. In such matters, it is widely recognized that it would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technological activities whose risks and operation the concerned industry closely guards as a secret. Strict liability is recognized in many jurisdictions, when assigning liability for inherently dangerous or hazardous activities.[423] The case for strict liability for ultrahazardous or abnormally dangerous activities was held to be the most proper technique both under common and civil law to enable victims of dangerous and ultrahazardous activities to recover compensation without having to establish proof of fault on the basis of what is often detailed technical evidence,[424] which, in turn, would require on the part of victims a complete understanding of the complicated and complex operation or activity. The case for strict liability is strengthened when the risk has been introduced unilaterally by the defendant.[425]

(14) In the case of damage arising from hazardous activities, it is fair to designate strict liability of the operator at the international level.[426] Strict liability has been adopted as the basis of liability in several instruments; and among the recently negotiated instruments it is provided for in article 4 of the Kiev Protocol, article 4 of the Basel Protocol; and article 8 of the Lugano Convention.

(15) In the case of activities which are not dangerous but still carry the risk of causing significant harm, there perhaps is a better case for liability to be linked to fault or negligence.

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[423] See the Secretariat Survey of Liability regimes, A/CN.4/543, paras. 29-260. The Indian Supreme Court in *M. C. Mehta v. Union of India*, AIR 1987 SC 1086 (the *Oleum Gas Leak* case) held that in the case of hazardous activities, exceptions which could be pleaded to avoid absolute or strict liability, like that the damage is not foreseeable, and that the use involved is a natural one, are not available. See the Report of the Indian Law Commission, *op. cit.*

[424] See Elspeth Reid, "Liability for Dangerous activities ... , *op. cit.*, p. 756. See also the Secretariat Survey of Liability regimes, A/CN.4/543, para. 23.

[425] Secretariat Survey of liability regimes, *ibid.*

[426] There was hesitation exhibited by the Working Group of the Commission in 1996 in designating damage arising from all activities covered within the scope of the draft principles subject to the regime of strict liability. It may be recalled that the Commission noted that the concepts of strict and absolute liability which "are familiar in the domestic law in many States and in relation to certain (that is, ultrahazardous) activities in international law ... have not been fully developed in international law, in respect to a large group of activities such as those covered by article 1". Brackets added. *Yearbook ... 1996*, vol. II (Part Two), Annex I, paragraph (1) of the general commentary to chapter III. In arriving at this conclusion the Working Group had the benefit of the Survey of liability prepared by the Secretariat, *Yearbook* ... 1995, vol. II (Part One), document A/CN.4/471.

In addition, since profits associated with the risky activity provide a motivation for industry in undertaking such activity, strict liability regimes are generally assumed to provide incentives for better management of the risk involved. However, this is an assumption, which may not always hold up. As these activities have been accepted only because of their social utility and indispensability for economic growth, States may consider at the opportune time reviewing their indispensability by exploring more environmentally sound alternatives which are also at the same time less hazardous.

(16) Strict liability may alleviate the burden that victims may otherwise have in proving fault of the operator but it does not eliminate the difficulties involved in establishing the necessary causal connection of the damage to the source of the activity. The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *condicio sine qua non* theory over the foreseeability ("adequacy") test to a less stringent causation test requiring only the "reasonable imputation" of damage. Further, the foreseeability test could become less and less important with the progress being made in the fields of medicine, biology, biochemistry, statistics and other relevant fields. Given these reasons, such tests have not been included in a more general analytical model on loss allocation.[427]

(17) The point worth bearing in mind is that in transforming the concept of strict liability from a domestic, national context - where it is well-established but with all the differences associated with its invocation and application in different jurisdictions - into an international standard, its ingredients should be carefully defined, keeping however its basic objective in view, that is, to make the person liable without any proof of fault for having created a risk by engaging in a dangerous or hazardous activity. Such a definition is necessary not only to capture the most

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[427] See Peter Wetterstein, "A Proprietary or Possessory Interest ..." *op. cit.*, pp. 29-53, at p. 40.

positive elements of the concept of strict liability as they are obtained in different jurisdictions. Such an approach would not only make the international standard widely acceptable but also ensure the standard adopted truly serves the cause of the victims exposed to dangerous activities thus facilitating prompt and effective remedies.

(18) This task can be approached in different ways.[428] For example, it could be done by adopting a proper definition of damage as has been done in the case of the "Use of Terms", which defines "damage" as damage to person, property and environment. It could also be done by designating strict liability as the standard for invoking liability, while also specifying that it is meant to include all damage foreseeable in its most generalized form and that knowledge of the extent of the potential danger is not a prerequisite of liability. Further, it may be clarified as part of application of the rule that it is sufficient if the use posed a risk of harm to the others and accordingly that it is not open to the operator to plead exemption from liability on the ground that the use involved is a natural one.

(19) The third sentence of paragraph 2 recognizes that it is part of the practice for States borne out in domestic and treaty practice to subject liability to certain conditions, limitations or exceptions. However, it must be ensured that such conditions, limitations or exceptions do not fundamentally alter the purpose of providing for prompt and adequate compensation. The point has thus been emphasized that any such conditions, limitations or exceptions shall be consistent with the purposes of the present draft principles.

(20) It is common to associate the concept of strict liability with the concept of limited liability. Limited liability has several policy objectives. It is justified as a matter of convenience to encourage the operator to continue to be engaged in such a hazardous but socially and economically beneficial activity. Strict liability is also aimed at securing reasonable insurance cover for the activity. Further, if liability has to be strict, that is, if liability has to be established

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[428] See the observations of Elspeth Reid, "Liability for Dangerous activities ... " *op. cit.*, pp. 741-743.

without a strict burden of proof for the claimants, limited liability may be regarded as a reasonable *quid pro quo*. Although none of the propositions are self-evident truths, they are widely regarded as relevant.[429]

(21) It is arguable that a scheme of limited liability is unsatisfactory, as it is not capable of providing sufficient incentive to the operator to take stricter measures of prevention. If the limits are set too low it could even become a licence to pollute or cause injury to others and externalize the real costs of the operator. Secondly, it may not be able to meet all the legitimate demands and claims of innocent victims for reparation in case of injury. For this reason, it is important to set limits of financial liability at a sufficiently high level, keeping in view the magnitude of the risk of the activity and the reasonable possibility for insurance to cover a significant portion of the risk involved.

(22) Article 9 of the Kiev Protocol and article 12 of the Basel Protocol provide for strict but limited liability. In contrast, article 6 (1) and article 7 (1) of the Lugano Convention provides for strict liability without any provision for limiting the liability. Where limits are imposed on financial liability of operator, generally such limits do not affect any interest or costs awarded by the competent court. Moreover, limits of liability are subject to review on a regular basis.

(23) Financial limits are well known in the case of regimes governing oil pollution at sea and nuclear incidents. For example, under the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992, the shipowner's maximum limit of liability is 59.7 million Special Drawing Rights; thereafter the International Oil Pollution Compensation Fund is liable to compensate for further damage up to a total of 135 million SDRs (including the amounts received from the owner), or in the case of damage resulting from natural phenomena, a

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[429] See Robin R.Churchill, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects", *Yearbook of International Environmental Law*, vol. 12 (2001), pp. 3-41, at pp. 35-37.

200 million SDRs.[430] Similarly, the 1997 Vienna Convention on Civil Liability for Nuclear Damage also prescribed appropriate limits for operator's liability.[431]

(24) Most liability regimes exclude limited liability in case of fault. The operator is made liable for the damage caused or contributed to by his or her wrongful intentional, reckless or negligent acts or omissions. Specific provisions to this extent are available for example in article 5 of the Basel Protocol and article 5 of the Kiev Protocol. In the case of operations involving highly complicated chemical or industrial processes or technology, fault liability could pose a serious burden of proof for the victims. Their rights could nevertheless be better safeguarded in several ways. For example, the burden of proof could be reversed requiring the operator to prove that no negligence or intentional wrongful conduct was involved. Liberal inferences may be drawn from the inherently dangerous activity. Statutory obligations could be imposed upon the operator to give access to the victims or the public to the information concerning the operations.

(25) One advantage of a strict but limited liability from the perspective of the victim is that the person concerned need not prove negligence and would also know precisely whom to sue. In cases where harm is caused by more than one activity and could not reasonably be traced to any one of them or cannot be separated with a sufficient degree of certainty, jurisdictions have tended to make provision for joint and several liability.[432] Existing international instruments also provide for that kind of liability.[433]

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[430] Article V (1) of the 1992 Protocol and article 4 of the Fund Convention. Following the sinking of the Erika off the French coast in December1999, the maximum limit was raised to 89.77 million SDRs, effective 1 November 2003. Under 2000 amendments to the 1992 Fund Protocol to enter into force in November 2003, the amounts have been raised from 135 million SDR to 203 million SDR. If three States contributing to the Fund receive in their territories combined quantities of equal to or more than 600 million tons of oil in the preceding year, the maximum amount is raised to 300,740,000 SDR, from 200 million SDR.

[431] For the text, ILM vol. 36 (1997) 1473. The installation State is required to assure that the operator is liable for any one incident for not less than 300 million SDRs or for a transition period of 10 years, a transitional amount of 150 million SDRs is to be assured, in addition by the installation State itself. The 1997 Convention on Supplementary Compensation provides an additional sum, which may exceed $1 billion. See Articles III and IV. For the text, ILM vol. 33 (1994) p. 1518.

[432] On joint and several liability, Lucas Bergkamp, *Liability and Environment: ... op. cit.*, pp. 298-306.

[433] For examples of treaty practice, see for example article IV of the 1969 International Convention on Civil Liability for Pollution Damage; article IV of the 1992 International Convention on Civil Liability for Pollution Damage; article 8 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; article 5 of the International Convention on Civil Liability for Bunker Oil Pollution Damage; article 4 of the Basel Protocol; article 4 of the Kiev Protocol; article 11

(26) If however, the person who has suffered damage has by his or her own fault caused the damage or contributed to it, compensation may be denied or reduced having regard to all the circumstances.

(27) It is also usual for liability regimes and domestic law providing for strict liability to specify a limited set of fairly uniform exceptions to the liability of the operator. A typical illustration of the exceptions to liability can be found in articles 8 and 9 of the Lugano Convention, article 3 of the Basel Convention or article 4 of the Kiev Protocol. Liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly the result of the wrongful intentional conduct of a third party.[434]

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of the Lugano Convention. See also article VII of the 1962 Convention on the Liability of Operators of Nuclear Ships; article II of the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article II of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 3 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; article 3 of the 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy.

[434] Under paragraphs 2 and 3 of article III of the 1992 International Convention on Civil Liability for Oil Pollution Damage *war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character* are elements providing exoneration from liability for the owner, independently of negligence on the part of the claimant. See also article III of the 1969 International Convention on Civil Liability for Oil Pollution Damage; article 3 of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; article 7 of the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea; article 3 of the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources provides similar language in respect of the *operator of an installation*; article 3 of the 1989 Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.

Exemptions are also referred to in article IV (3) of the 1997 Protocol to amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage: no liability under this Convention shall attach to an operator if he proves that the nuclear damage is directly due to an act of armed conflict, civil war, insurrection. See also article IV (3) of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 9 of 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; article 3 (5) of the annex to the 1997 Convention on Supplementary Compensation for Nuclear Damage Convention; article 4 (1) of the EU Directive 2004/35 on environmental liability. The Directive also does not apply to activities whose main purpose is to serve national defence or international security. In accordance with article 4 (6), it also does not apply to activities whose sole purpose is to protect from natural disasters. Terrorist acts are included in the most recent liability instrument: article 8 (1) of Annex VI to the Madrid Protocol to the Antarctic Treaty entitled Liability Arising from Environmental Emergencies provides: "An operator shall not be liable pursuant to Article 6 if it proves that the environmental emergencies caused by: (a) an act or omission necessary to protect human life or safety; (b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their

(28) Paragraph 3 provides that the "measures" envisaged under paragraph 1 should include imposition of a requirement on the operator or, where appropriate other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation. The objective here is to ensure that the operator has sufficient funds at his disposal to enable him to meet claims of compensation, in the event of an accident or incident. It is understood that availability of insurance and other financial securities for hazardous operations depends upon many factors and mostly on the ability of the operator to identify the "risk" involved as precisely as possible. The assessment of "risk" for this purpose should not only consider the risk inherent in the activity to cause damage but also the statistical probability of the type and number of claims that such damage might give rise as well as the number of claimants that may be involved.

(29) In the case of activities with a risk of causing significant transboundary harm, the insurance cover would have to provide for the "foreign loss event" in addition to the "domestic loss event". The modern dynamics of law governing causation multiplies the factors that the operator in the first instance and the insurers ultimately would have to take into account while assessing the "risk" that need to be covered. In this connection, the liberal tests that are invoked to establish a causal link, widening the reach of the tests of "proximate cause" and "foreseeability" and even replacing the same with a broader "general capability" test, are at issue.[435]

(30) Despite these difficulties it is encouraging that insurance cover is increasingly being made available for damage to persons or property or environment due to oil spills and other hazardous activities.[436] This is mainly because of the growing recognition on the part of the industry, the consumers, and the Governments that the products and services that the hazardous industry is able to provide are worthy of protection in the public interest. In order to maintain

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potential adverse impact; (c) an act of terrorism ; or (d) an act of belligerency against the activities of the operator." For examples at domestic law, see Secretariat Survey of Liability regimes, A/CN.4/543, paras. 434-476.

[435] Hans-Dieter Sellschopp, "Multiple Tortfeasors/Combined Polluter Theories, Causality and Assumption of Proof/Statistical Proof. Technical Insurance Aspects" in Ralph P. Kroner (ed.), *Transnational Environmental Liability … op. cit.*, pp. 51-57, pp. 52-53.

[436] Charles S. Donavan and Elizabeth M. Miller, "Limited Insurability of Unlimited Liability: Serial Claims Aggregates and Alternatives: the American View" in Ralph Kroner (ed.), *Transnational Environmental Liability ibid.*, pp. 129-158. Werner Pfennigstorf, "Limited Insurability of Unlimited Liability: Serial Claims Aggregates and Alternatives: The Continental View" in Ralph Kroner (ed.), *ibid.*, pp. 159-165.

these products and services the losses that such activities generate must be widely allocated and shared. Insurance and financial institutions are indispensable actors in any such scheme of allocation. These are institutions with expertise to manage risk and their profitability lies in pooling financial resources and wisely investing in risk bearing activities.[437] However, it is inevitable that premium for insurance cover of the hazardous activities grows in direct proportion to the range and magnitude of the risk that is sought to be covered. The raise in the premium costs is also directly related to the growing trend to designate operator's liability as strict. Further, the trend to raise the limits of liability to higher and higher levels, even if the operator's liability is maintained under a cap, is also a factor in the rising costs of premiums.

(31) The State concerned may establish minimum limits for financial securities for such purpose, taking into consideration the availability of capital resources through banks or other financial agencies. Even insurance schemes may require certain minimum financial solvency from the operator to extend their cover. Under most of the liability schemes, the operator is obliged to obtain insurance and such other suitable financial securities.[438] This may be particularly necessary to take advantage of the limited financial liability scheme, where it is available. However, in view of the diversity of legal systems and differences in economic conditions some flexibility for States in requiring and arranging suitable financial and security guarantees may be envisaged.[439] An effective insurance system may also require wide participation by potentially interested States.[440]

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[437] Anthony J. Fitzsimmons, "Non-Marine Environmental Liability: The Use of Insurance Pools and the European Dimension", in Ralph P. Kroner, *ibid.*, pp. 166-179, at pp. 166-167.

[438] For treaty practice, see for example article III of the 1962 Convention on the Liability of Operators of Nuclear Ships; article VII of the 1997 Protocol to the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage; article 10 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy; article 10 of the 2004 Protocol to amend the 1960 Convention on Third Party Liability in the Field of Nuclear Energy. See also article V of the 1992 International Convention on Civil Liability for Pollution Damage; article 12 of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage article 14 of the Basel Protocol; article 11 of the Kiev Protocol; article 12 of the Lugano Convention.

[439] See for example the statement by China, in *Official Records of the General Assembly, Fifty-eighth Session, Summary Records, Sixth Committee*, A/C.6/58/SR.19, para. 43.

[440] See for example the statement by Italy, *ibid.*, A/C.6/58/SR.17, para. 28.

(32) The importance of such mechanisms cannot be overemphasized. It has been noted that: "financial assurance is beneficial for all stakeholders: for public authorities and the public in general, it is one of the most effective, if not the only, way of ensuring that restoration actually takes place in line with the polluter-pays principle; for industry operators, it provides a way of spreading risks and managing uncertainties; for the insurance industry, it is a sizeable market".[441] Such insurance coverage should also be available for clean-up costs.[442]

(33) Insurance coverage is available in some jurisdictions, such as the United States and in Europe. The experience gained in such markets can be quickly transferred to other markets as the insurance industry is growing in global market. Article 14 of the EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage for example provides that member States shall take measures to encourage the development of security instruments and markets by the appropriate security, economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

(34) One of the consequences of ensuring the availability of insurance and financial security is that a claim for compensation may be allowed as one option under domestic law directly against any person providing financial security cover. However, such a person may be given the right to require the operator to be joined in the proceedings. Such a person is also entitled to invoke the defences that the operator would otherwise be entitled to under the law. Article 11 (3) of the Kiev Protocol and article 14 (4) of the Basel Protocol provide for such possibilities. However, both Protocols allow States to make a declaration, if they wish, not allowing for such direct action.

(35) Paragraphs 4 and 5 refer to the other equally important measures that the State should focus upon. This is about establishing supplementary funds at the national level. This, of course, does not preclude the assumption of these responsibilities at subordinate level of government in the case of a State with a federal system. Available schemes of allocation of loss

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[441] See Proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Brussels, 23.1.2002, COM (2002) 17 final, pp. 7-9.

[442] *Ibid.*

envisage some sort of supplementary funding to meet claims of compensation in case the funds at the disposal of the operator are not adequate enough to provide compensation to victims. Most liability regimes concerning dangerous activities provide for additional funding sources to meet the claims of damage and particularly to meet the costs of response and restoration measures that are essential to contain the damage and to restore value to affected natural resources and public amenities.

(36) Additional sources of funding could be created out of different accounts. One account could be out of public funds, as part of national budget. In other words, the State could take a share in the allocation of loss created by the damage, as it happened in the case of the nuclear energy operations. Another account could be a common pool of fund created by contributions either from operators of the same category of dangerous activities or from entities for whose direct benefit the dangerous or hazardous activity is carried out. This is the case with management of risks associated with transport of oil by sea. But in the case of hazardous activities which are very special supplementary funds may have to be developed through some form of taxation on consumers of the products and services the industry generates and supports. This may be particularly necessary if the pool of operators and directly interested consumers is very thin and not connected by any common economic or strategic interest.

(37) Paragraph 4 deals with industry funding and provides that in appropriate cases, these measures should include the requirement for the establishment of industry funds at the national level. The words "these measures" reflects the fact that the State has the option of achieving the objective of setting up of industry wide funding in a variety of ways depending upon its particular circumstances.

(38) Paragraph 5 provides that in the event the measures mentioned in the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available. While it does not directly require the State of origin to set up government funds to guarantee prompt and adequate compensation, it provides that the State of origin should ensure that sufficient financial resources are available in case of damage arising from a hazardous operation situated within its territory or in areas under its jurisdiction.

(39) Paragraphs 3, 4 and 5 are framed as guidelines to encourage States to adopt best practices. The freedom of States to choose one option or the other in accordance with its particular circumstances and conditions is the central theme of the present draft principle. This would however require vigilance on the part of the State of origin to continuously review its domestic law to ensure that its regulations are kept up to date with the development of technology and industry practices at home and elsewhere.

Principle 5

Response measures

Upon the occurrence of an incident involving a hazardous activity which results or is likely to result in transboundary damage:

(*a*) the State of origin shall promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary damage;

(*b*) the State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology;

(*c*) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(*d*) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage;

(*e*) the States concerned should, where appropriate, seek the assistance of competent international organizations and other States on mutually acceptable terms and conditions.

Commentary

(1) Draft principle 5 deals with the situation arising after the occurrence of transboundary damage both from legal and practical perspectives. As soon as an incident involving a hazardous activity results or is likely to result in transboundary damage, with or without simultaneous damage within the territory of the State of origin, the State of origin is called upon to do several things. First, it is expected to obtain from the operator the full facts available about the incident, and most importantly of the dangers the damage posed to the population, their property, and to the environment in the immediate neighbourhood. Second, it is expected to ensure that

appropriate measures are taken within the means and contingency preparedness at its disposal to mitigate the effects of damage and if possible to eliminate them. Such response measures should include not only clean-up and restoration measures within the jurisdiction of the State of origin but also extend to contain the geographical range of the damage to prevent it from becoming transboundary damage, if it had already not become one. Third, the State of origin is duty-bound to inform all States affected or likely to be affected. The notification must contain all necessary information about the nature of damage, its likely effects on persons, property and environment and the possible precautions that need to be taken to protect them from its ill-effects or to contain or mitigate or eliminate the damage altogether.

(2) Paragraph (a) which deals with prompt notification is an obligation of due diligence imposed upon the State of origin.[443] The notification obligation has to be performed as soon as it is practicable. It shall contain all relevant information that is available to the State of Origin. In some instances it may not be immediately possible for the State of origin to ascertain the full set of relevant facts and to gather information about the nature of damage and remedial action that can and should be taken.

(3) Paragraph (b) requires the State to take appropriate response measures and provides that it should rely upon the best available means and technology. The State of origin is expected to perform the obligation of due diligence both at the stage of authorization of hazardous activities[444] and in monitoring the activities in progress after authorization and extending into the phase when damage might actually materialize, in spite of best efforts to prevent the same. The International Court of Justice in the *Case concerning the Gabcikovo-Nagymoros Project*

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[443] Phoebe N. Okowa, "Procedural Obligations in International Environmental Agreements", BYBIL vol. 67 (1996), pp. 275-336, at p. 330 where it is observed that the existence in general international law of the duty to warn States at risk in emergency situations has received the "endorsement of the International Court in the *Corfu Channel* case and in the *Nicaragua case*". It is a duty that is the subject of the 1986 IAEA Convention on Early Notification of a Nuclear Accident, which "confirms the established position at customary law", see p. 332.

[444] Closely associated with the duty of prior authorization is the duty to conduct an environmental impact statement (EIA). See Xue Hanqin, *Transboundary Damage ... op. cit.*, at p. 166. Phoebe Okowa notes at least five types of ancillary duties associated with the obligation to conduct EIA. One of them is that the nature of the activity as well as its likely consequences must be clearly articulated and communicated to the States likely to be affected. However, she notes that with the exception of a few conventions, it is widely provided that the State proposing the activity is the sole determinant of the likelihood or seriousness of adverse impact. None of the treaties under consideration permit third States to propose additional or different assessments if they are dissatisfied with those put forward by the State of origin. See Phoebe N. Okowa, *ibid.*, at pp. 282-285, p. 285 and on the content of EIA, *ibid.*, fn. 25, p. 282, p. 286.

noted the need for continuous monitoring of hazardous activities as result of "awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis".[445]

(4) Further, the State concerned should ever be vigilant and ready to prevent the damage as far as possible and when damage indeed occurs to mitigate the effects of damage with the best available technology.[446] The role of the State envisaged under the present draft principle is thus complementary to the role assigned to it under draft articles 16 and 17 of the draft articles on prevention, which deal with requirements of "emergency preparedness" and "notification of emergency".[447]

(5) The present draft principle however should be distinguished and goes beyond those provisions. States should develop, by way of response measures, necessary contingency preparedness and employ the best means at their disposal once the emergency arises, consistent with the contemporary knowledge of risks and technical, technological and financial means available to manage them. It deals with the need to take necessary response action within the State of origin after the occurrence of an incident resulting in damage, but if possible before it acquires the character of transboundary damage. In this process, the States concerned should seek if necessary assistance from competent international organizations and other States as provided in sub-paragraph (e).

(6) The requirement in paragraph (b) is directly connected to the application of the precautionary approach.[448] As with the application of the precautionary approach in any

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[445] Judgment, *I.C.J. Reports 1997*, p. 7, para. 112.

[446] *Ibid.*, at para. 140. The Court stated that it "is mindful that in the field of environmental protection vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage."

[447] For the text and commentaries of articles 16 and 17 of the draft articles on prevention, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/56/10), pp. 370-436, at 429-433. For the view that the treaty obligations to maintain contingency plans and respond to pollution emergencies must be seen as part of State's duty of due diligence in controlling sources of known environmental harm, Birnie and Boyle, *International Law …, op. cit.*, p. 137. The authors also note at p. 136 that "it is legitimate to view the *Corfu Channel* case as authority for customary obligation to give warning of known environmental hazards".

[448] On the requirement of best available technology, Rudiger Wolfrum noted that it is closely associated with the precautionary principle, see Rudiger Wolfrum "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance", in Fred L. Morrison and Rudiger Wolfrum, *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 2003), p. 15. It is also suggested the term "available" means that "States are responsible for applying those technological advances that have already been marketed, as

particular field, this allows some flexibility and is expected to be performed keeping in view all social and economic costs and benefits.[449] Indeed the principle that States should ensure that activities within their jurisdiction and control do not give rise to transboundary harm cannot be overemphasized. The importance of response action once an accident or incident has occurred triggering significant damage could not equally be overstated. In fact, such measures are necessary to contain the damage from spreading, and should be taken immediately. This is done in most cases even without losing any time over identifying the responsible person or the cause or fault that triggered the event. Paragraph (b) assigns to the State of origin the responsibility of determining how such measures should be taken and by whom, which includes the appropriate involvement of the operator. The State would have the option of securing a reimbursement of costs of reasonable response measures.

(7) It is common for the authorities of the State to swing immediately into action and evacuate affected people to places of safety and provide immediate emergency medical and other relief. It is for this reason that the principle recognizes the important role that the State plays and should play in taking necessary measures as soon as the emergency arises, given its role in securing at all times the public welfare and protecting the public interest.

(8) Any measure that the State takes in responding to the emergency created by the hazardous activity does not and should not however put the role of the operator in any secondary or residuary role. The operator has a primary responsibility to maintain emergency preparedness and operationalize any such measures as soon as an incident occurs. The operator could and should give the State all the assistance it needs to discharge its responsibilities. Particularly, the operator is in the best position to indicate the details of the accident, its nature, the time of its occurrence and its exact location and the possible measures that parties likely to be affected could take to minimize the consequences of the damage.[450] Accordingly, the possibility of an

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opposed to every new development in pollution control", see Peter-Tobias Stoll, "Transboundary Pollution", in Fred L. Morrison and Rudiger Wolfrum, pp. 169-200, p. 182.

[449] Guidelines on Precautionary Principle in the context of biodiversity conservation and natural resource management, prepared under a joint initiative of Fauna and Flora International, IUCN-the World Conservation Union, *Environmental Policy and Law*, vol. 35/6 (2005), pp. 274-275, at p. 275.

[450] States are required to notify such details in case of nuclear incidents. See article 2 of the IAEA Notification Convention. They must also give the States likely to be affected through the IAEA other necessary information to minimize the radiological consequences. Sands, *Principles ... op. cit.*, pp. 845-846.

operator, including a transnational corporation, being first to react, is not intended to be precluded. In case the operator is unable to take the necessary response action, the State of origin shall make arrangements to take such action.[451] In this process it can seek necessary and available help from other States or competent international organizations.

(9) Paragraph (c) provides that the State of origin, in its own interest and even as a matter of duty borne out of "elementary considerations of humanity",[452] should consult the States affected or likely to be affected to determine the best possible response action to prevent or mitigate transboundary damage.[453] Consultations are usually triggered upon request. It is considered that the qualification, "as appropriate", would be sufficiently flexible to accommodate necessary consultation among concerned States and to engage them in all possible modes of cooperation, depending upon the circumstances of each case. The readiness of States to cooperate may not be uniform; it depends on their location; the degree to which they feel obliged to cooperate, as well as upon their preparedness and capacity.

(10) Paragraph (d) on the other hand requires States affected or likely to be affected to extend to the State of origin their full cooperation. Once notified, the States affected also are under a duty to take all appropriate and reasonable measures to mitigate the damage to which they are

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[451] Under articles 5 and 6 of the EU Directive 2004/35/CE, competent authorities, to be designated under article 13, may require the operator to take necessary preventive or restoration measures or take such measures themselves, if the operator does not take them or cannot be found.

[452] See *Corfu Channel case I.C.J. Reports 1949*, p. 4, at p. 22. For reference to the particular concept as part of "obligations … based … on certain general and well-recognized principles", as distinguished from the traditional sources of international law enumerated in article 38 of the Statute of the International Court of Justice, Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des Cours*, … vol. 250 (1994-VI), pp. 291-292.

[453] On the duty of States to notify and consult with each other with a view to take appropriate actions to mitigate damage, and for citation of relevant legal instruments including Principle 18 of the Rio Declaration, 1992 Industrial Accidents transboundary accidents, 1992 Biodiversity Convention and the 2000 Biosafety Protocol and the treaties in the field of nuclear accidents and the IAEA 1986 Early Notification Convention, see Sands, *Principles … op. cit.*, pp. 841-847.

exposed.[454] These States should take such response measures as are within their power in areas under their jurisdiction or control to help prevent or mitigate such transboundary damage. They may also seek such assistance as is available from the competent international organizations and other States as envisaged in paragraph (e). Such a response action is essential not only in the public interest but also to enable the appropriate authorities and courts to treat the subsequent claims for compensation and reimbursement of costs incurred for response measures taken as reasonable.[455]

(11) Paragraph (c) is self-explanatory and is modelled on article 28 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997. It is expected that arrangements for assistance between States or competent international organizations and the States concerned would be on the basis of mutually agreed terms and conditions. Such arrangements may be conditioned by the priorities of assistance of the receiving State; the constitutional provisions and mandates of the competent international organizations; financial and other arrangements concerning local hospitality or immunities and privileges. Any such arrangements should not be based on purely commercial terms and be consistent with the elementary considerations of humanity and the importance of rendering humanitarian assistance to the victims in distress.

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[454] In the *Gabcikovo-Nagymoros Project* case, in defense of the variant C it implemented on the river Danube appropriating nearly 80 to 90 per cent water of the river Danube, in the face of Hungary's refusal to abide by the terms of the Treaty concluded between Czechoslovakia and Hungary, 1977, Slovakia argued that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained." The Court referring to this principle noted that "it would follow from such a principle that an injured State which has failed to take necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided". The Court observed that "(W)hile this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act." It is a different matter that the Court found the implementation of variant C as a wrongful act and hence did not go further to examine the principle of the duty of the affected States to mitigate the effects of damage to which they are exposed. See Judgment, *I.C.J. Reports 1997*, p. 7, para. 80. The very willingness of the Court to consider any failure in this regard as an important factor in the computation of damages to which those States would eventually be entitled amounts to an important recognition under general international law of the duty imposed on States affected by transboundary harm to mitigate the damage to the best extent they can.

[455] In general, on the criterion of reasonableness in computing costs admissible for recovery, see Peter Wetterstein, "A Proprietory or Possessory Interest ...", *op. cit.*, pp. 47-50.

Principle 6

International and domestic remedies

1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.

Commentary

(1) Draft principle 6 indicates some broad measures necessary to operationalize and implement the objective set forth in draft principle 4. In one sense, draft principles 4 and 6 together encompass the substantive and procedural measures reflected in the expectation that the State of origin and other States concerned would provide minimum standards without which it would be difficult or impossible to implement the requirement to provide effective remedies, including the opportunity to seek payment of prompt and adequate compensation to victims of transboundary damage.[456] The substantive minimum requirements such as channelling of liability, designating liability without proof of fault, specifying minimum conditions, limitations or exceptions for such liability, establishing arrangements for financial guarantees or securities to cover liability are addressed within the framework of draft principle 4. On the other hand, draft principle 6 deals with the procedural minimum standards. They include equal or non-discriminatory access to justice, availability of effective legal remedies, and recognition and

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[456] Rene Lefeber perceptively noted that the purpose of minimum standards, in the context of developing a legal regime addressing transboundary damage, is to facilitate victims obtaining prompt (timely) adequate (quantitatively) and effective (qualitative) compensation. It has procedural and substantive sides. Rene Lefeber, *Transboundary Environmental* ... *op. cit.*, pp. 234-236.

enforcement of foreign judicial and arbitral decisions. It also addresses the need to provide recourse to international procedures for claim settlements that are expeditious and less costly.

(2) Paragraphs 1, 2 and 3 focus on domestic procedures and the development and confirmation of the principle of equal or non-discriminatory access. The 1974 Stockholm Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden is one of the most advanced forms of international cooperation available among States recognizing the right to equal access to justice. This was possible of course because the environmental standards are largely the same among the Nordic countries. Article 3 of the Convention provides equal right of access to persons who have been or may be affected by an environmental harmful activity in another State. The right of equal access to courts or administrative agencies of that State is provided "to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on". The transboundary applicant is allowed to raise questions concerning the permissibility of the activity, appeal against the decisions of the Court or the administrative authority and seek measures necessary to prevent damage. Similarly the transboundary victim could seek compensation for damage caused on terms no less favourable than the terms under which compensation is available in the State of origin.[457]

(3) The principle of equal access goes beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants by providing for access to information, and helping appropriate cooperation between the relevant courts and national authorities across national boundaries. This principle is also reflected in

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[457] For comment on the Convention see Stephen C. McCaffrey, *Private Remedies for Transfrontier Environmental Disturbances* (IUCN and Natural Resources, Morges, Switzerland, 1975), pp. 85-87. The main contribution of the Convention is the creation of a Special Administrative Agency to supervise the transbounday nuisances in each State party for more intensive intergovernmental consultation and cooperation. The Agency is given standing before the courts and administrative bodies of other contracting States. The Convention does not however apply to pending causes. It does not have an express provision for waiver of State immunity. It is also silent on the question of the proper applicable law for the determination of liability and calculation of indemnities, though it is assumed that the proper law for the purposes will be the law of the place where the injury is sustained. In contrast the OECD recommended to its members a more gradual implementation of flexible bilateral or multilateral accords on measures for the facilitation at the procedural level of transnational pollution abatement litigation. See Philip McNamara, *The Availability of Civil Remedies ... op. cit.*, pp. 146-147.

Principle 10 of the Rio Declaration and in Principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment.[458]

(4) Paragraph 1 sets forth the obligation to provide domestic judicial and administrative bodies with the necessary jurisdiction and competence to be able to entertain claims concerning transboundary harm, as well as the effectiveness of the remedies that are made available. It stresses the importance of removing hurdles in order to ensure participation in administrative hearings and judicial proceedings. Once the transboundary damage occurs, transboundary victims should be provided equal access to administrative or quasi-judicial and/or judicial bodies charged with jurisdiction to deal with claims for compensation. As already described in the commentary to draft principle 4, this may be satisfied by providing access to domestic courts in accordance with due process or by negotiation with victims or States concerned.

(5) Paragraph 2 emphasizes the importance of non-discriminatory principle in the determination of claims concerning hazardous activities.[459] The principle of non-discrimination provides that the State of origin should ensure no less prompt, adequate and effective remedies to victims of transboundary damage than those that are available to victims within its territory for similar damage. This principle could thus be seen to be referring to both procedural and substantive requirements. In terms of its procedural aspects it means that the State of origin should grant access to justice to the residents of the affected State on the same basis as it does for its own nationals or residents. This is an aspect which is gaining increasing acceptance in State practice.[460]

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[458] K.W. Cuperus and A.E. Boyle, *Articles on Private Law Remedies for Transboundary Damage in International Watercourses*, International Law Association, Report of the 67th Conference, Helsinki (1986) at p. 407.

[459] It may be recalled that article 16 of the draft articles on prevention provides for a similar obligation for States in respect of the phase of prevention during which they are required to manage the risk with all due diligence. A similar provision covering the phase where injury actually occurred, despite all best efforts to prevent damage, can be found in article 32 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

[460] See Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Ardsley, NY: Transnational Publishers, 2004), pp. 201-203; Birnie and Boyle, *International Law …, op. cit.*, pp. 269-270. According to the procedural aspect of non-discrimination some requirements of the procedural laws of the State of origin should be removed; among them are, as Cuperus and Boyle note, "the security of costs from foreign plaintiffs, the denial of legal aid and the denial of jurisdiction over actions involving foreign land". K.W. Cuperus and A.E. Boyle, *Articles on Private Law Remedies …, op. cit.*, pp. 406-407.

(6) The substantive aspect of the principle, on the other hand, raises more difficult issues concerning its precise content and lacks similar consensus.[461] On the face of it, as long as the same substantive level of remedies are available to the nationals as are provided to the transboundary victims, the requirements of the principle appear to have been met. However, the problem arises if nationals themselves are not provided with the minimum substantive standards, in which case the principle would not guarantee any such minimum standards to foreign victims involved in the transboundary damage. A number of States are in the process of developing the minimum substantive standards as part of their national law and procedures.

(7) Paragraph 3 provides a without prejudice clause. It should be noted that paragraphs 1 and 2 do not alleviate problems concerning choice of law or choice of forum, which, given the diversity and lack of any consensus among States, may be a significant obstacle to the delivery of prompt, adequate and effective judicial recourse and remedies to victims,[462] particularly if they are poor and not assisted by expert counsel in the field. States could move the matters forward by promoting harmonization of laws and by agreement to extend such access and remedies.

(8) It may be noted that with respect to choice of forum that instead of the law of the domicile[463] of the operator, the claimant may seek recourse to a forum, which he or she deems

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[461] Birnie and Boyle note that insofar as it is possible to review State practice on such a disparate topic as equal access, it is not easy to point to any clear picture, *ibid.*, pp. 271-274. On the limitations of the non-discrimination rule, *ibid.*, pp. 274-275. Also see Xue Hanqin, *Transboundary ..., op. cit.*, pp. 106-107. Also see Alexander Kiss and Dinah Shelton, *International Environmental, ibid.*, pp. 201-203. Birnie and Boyle, *International Law, op. cit.*, pp. 269-270, P.M. Dupuy, "La contribution du principe de non discrimination a l'élaboration du droit international de l'environnement", *Revue Québécoise de Droit International*, vol. 7 (1991-1992), p. 135. For the view that the principle of non-discrimination has become a principle of general international law, see Henri Smets, "Le Principe de Non-discrimination En Matière de Protection de l'Environnement", *Revue Européenne de Droit de l'Environnement*, 1/2000, at p. 3.

[462] K.W. Cuperus and Alan E. Boyle, *Articles on Private Law Remedies for ..., op. cit.*, pp. 403-411, p. 406. See Lefeber, *Transboundary Environmental Interference ... op. cit.*, pp. 264-266 on the divergence of State practice in matters of deciding on the choice of forum and applicable law.

[463] This is based on the principle "*actor sequitur forum rei*", a principle that promotes the policy that the defendant is best able to defend himself or itself in the courts of the State in which he or it is domiciled. This is justified on the ground that the force of a judgment is directed against the defendant. However, while the domicile of the natural person is left to be determined by the law of each State, the case of the nationality of the legal persons or the corporations is not so settled. The Brussels Convention and the parallel Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, Lugano, 16 September 1988 "leave the determination of domicile to the law that is determined by the law of conflict of laws as administered by the courts of the State where the claim is filed," see C. van Bar, "Environmental Damage in Private International law", *Recueil des Cours ...*, vol. 268 (1997), 295-411, at p. 336.

most appropriate to pursue the claim. This may be the forum of the State where an act or omission causing injury took place or where the damage arose.[464] It has been asserted that the provision of such a choice is considered to be based on "a trend now firmly established in both Conventions on international jurisdiction and in national systems".[465] Under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters remedies may be made available only in the jurisdiction of a party where: (a) the act or omission causing injury took place; (b) the damage was suffered; (c) the operator has his domicile or her habitual residence; or (d) the operator has his or her principal place of business. Article 19 of the 1993 Lugano Convention, article 17 of the Basel Protocol, and article 13 of Kiev Protocol provide for similar choice of forum.

(9) In the matter of choice of law, State practice is not uniform: different jurisdictions have adopted either the law that is most favourable to the victim or the law of the place which has the most significant relationship with the event and the parties.[466]

(10) Paragraph 4 highlights a different aspect in the process of ensuring the existence of remedies for victims of transboundary harm. It is intended to bring more specificity to the nature of the procedures that may be involved other than domestic procedures. It refers to "international claims settlement procedures". Several procedures could be envisaged. For example, States could in the case of transboundary damage negotiate and agree on the quantum of compensation payable or even make payment ex gratia.[467] These may include mixed claims

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[464] See the International Law Association, Second Report (by Christophe Bernasconi and Gerrit Betlem) on Transnational Enforcement of Environmental Law, International Law Association, Berlin Conference (2004), Report of the Seventy-First Conference, Berlin, 2004, pp. 896-938, p. 900. A defence against this ground of jurisdiction is however admissible if it can be established that damage in the State, not being the State of origin, is not foreseeable.

[465] *Ibid.*, p. 899.

[466] The "most favourable law principle" is adopted in several jurisdictions in Europe, Venezuela, and Tunisia. However, United States law appears to favour the law of the place which has the "most significant relationship" with the event and the parties, *ibid.*, pp. 911-915.

[467] In the case of damage caused to the fishermen, nationals of Japan due to nuclear tests conducted by the United States of America in 1954 near the Marshall Islands, the latter paid to Japan US$ 2 million. Department of State Bulletin, Washington DC, vol. 32, No. 812, 17 January 1955, pp. 90-91. For similar payment of C$ 3 million by way of compensation by the USSR to Canada following the crash of Cosmos 954 in January 1978. ILM vol. 18, 1979, p. 907. Sands notes that though several European States paid compensation to their nationals for damage suffered due to the Chernobyl nuclear accident, they did not attempt to make formal claims for compensation, even while they reserved their right to do so, Philippe Sands, *Principles, op. cit.*, pp. 886-889. The State may agree to pay *ex gratia* directly to the victims, e.g. the United States Government agreed to pay to Iranian victims of shooting the Iranian Airbus 655 by the USS Vincennes. States may also conclude treaties setting up international claims

commissions, negotiations for lump sum payments, etc. The international component does not preclude possibilities whereby a State of origin may make a contribution to the State affected to disburse compensation through a national claims procedure established by the affected State. Such negotiations need not, unless otherwise desired, bar negotiations between the State of origin and the private injured parties and such parties and the person responsible for the activity causing significant damage. A lump sum compensation could be agreed either as a result of a trial or an out of court settlement.[468] Victims could immediately be given reasonable compensation on a provisional basis, pending decision on the admissibility of claim and the award of compensation. National courts, claims commissions or joint claims commissions established for this purpose could examine the claims and settle the final payments of compensation.[469]

(11) The United Nations Compensation Commission[470] and the Iran-United States Claims Tribunal[471] may offer themselves as useful models for some of the procedures envisaged under paragraph 4.

(12) The Commission is aware of the practical difficulties, such as expenses and the time-lags involved, in pursuing claims in a transnational context or on an international plane. There is justification in the criticism, applicable to some cases but not all, that civil law remedies

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commission to settle compensation claims as between private parties. See Lefeber, *Transboundary Environmental Interference, op. cit.*, p. 238, fn. 21. Mention may also be made of the draft articles 21 and 22 adopted by the working group of the Commission in 1996. Draft article 21 recommended that the State of origin and the affected States should negotiate at the request of either party on the nature and extent of compensation and other relief. Draft article 22 referred to several factors that States may wish to consider for arriving at the most equitable quantum of compensation. For the report of the Working Group of the Commission, 1996, *Official Records of the General Assembly, Fifty-first Session Supplement No. 10* (A/51/10), pp. 320-327.

[468] In connection with the Bhopal Gas Leak Disaster, the Government of India attempted to consolidate the claims of the victims. It sought to seek compensation by approaching the United States court first but the action failed on grounds of forum non-conveniens. The matter was then litigated before the Supreme Court of India. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 provide the basis for the consolidation of claims. The Supreme Court of India in the *Union Carbide Corporation v. Union of India and others, All India Reports* 1990 SC 273 gave an order settling the quantum of compensation to be paid in lump sum. It provided for the Union Carbide to pay a lump sum of $470 million to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal Gas Disaster. The original claim of the Indian Government was over $1 billion.

[469] For the April 2002 award of $324, 949,311 to people of Enewatak in respect of damages to the land arising out of nuclear programmes carried out by the United States between 1946-1958, see ILM vol. 39 (2000), p. 1214.

[470] On the procedure adopted by the United Nations Claims Commission, see Mojtaba Kazazi, "Environmental Damage in the Practice of the United Nations Compensation Commission", in Michael Bowman and Alan Boyle, *Environmental Damage … op. cit.*, pp. 111-13.

[471] The rules of procedure of the Iran-United States Claims Tribunal are available at www.iusct.org.

requiring victims to pursue their claims in foreign national judicial and other forums may be "very complex, costly and ultimately devoid of guarantee of success".[472] The reference to procedures that are expeditious and involving minimal expenses is intended to respond to this aspect of the matter and reflect the desire not to overburden the victim with an excessively lengthy procedure which may act as a disincentive. There have been several incidents of damage in recent years involving settlement of claims for compensation.[473] Some of them are settled out of court. Others have been settled by recourse to civil liability regimes. The conclusion from the experience of different cases is that both States and concerned entities representing the victims must get involved to settle claims out of court or the victims must be given equal or non-discriminatory right of access to civil law remedies.[474]

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[472] See Lefeber, *Transboundary Environmental Interference ... op. cit.*, footnote 104, p. 259.

[473] (i) In Ixtoc I blowout in June 1979 in the Bay of Campeche off the coast of Mexico, pp. 239-240 (oil rig was owned by a United States company, controlled by a Mexican State-owned company, and operated by a privately owned Mexican drilling company involving US$ 12.5 million clean-up costs and an estimated US$ 400 million loss by the fishing and tourism industry; settled out of court between the United States Government and the United States company without going into questions of formal liability. Paid US$ 2 million to the United States Government, and US$ 2.14 million towards losses suffered by fishermen, tourist resorts, and others affected by the oil spill) ILM vol. 22 (1983) p. 580; (ii) the Cherry Point Oil Spill, pp. 249 (Canada and Atlantic Richfield Oil Refinery, a corporation of the United States of America settled claims out of court, in respect of an oil spill caused by a Liberian tanker while unloading oil at Cherry Point, State of Washington, in the United States waters causing oil pollution to the Canadian beaches in the west coast) Canadian Yearbook of International Law, vol. XI (1973) p. 333; the Sandoz case, Lefeber, *Transboundary Environmental Interference ... op cit.*, pp. 251-252 (The water used to extinguish fire that broke out at the Sandoz Chemical Corporation on 1 November 1986 polluted the River Rhine, caused significant harm downstream in France, Germany, and the Netherlands. Economic harm had to be compensated. This involved clean-up costs and other response measures including monitoring and restoration costs. Pure economic loss was also involved as a result of loss caused to the fishing freshwater industry. The settlement of claims was at private level. More than 1,000 claims were settled in the amount of 36 million German marks. Most of the compensation was paid to States but some private parties also received compensation); Bhopal Gas case, in Lefeber, pp. 253-254 (claim was settled out of court between the Union Carbide Corporation, the United States of America and the Government of India for US$ 470 million, while the initial claim for compensation was more than that); The *Mines de Potasse d'Alsace*, in Lefeber, pp. 254-258 (A French company polluted the River Rhine with chlorides through discharge of waste salts. Such discharge was considered a normal operation. But the high salinity of the river was a matter of concern downstream to potable water companies, industry, and market gardeners which traditionally used the water for their commerce. Governments concerned, Switzerland, France, Germany, and the Netherlands negotiated an agreement to reduce the chloride pollution in 1976 at Bonn which came into force only in 1985 but it did not last. Another Protocol was concluded in 1991. Still the problem of high salinity continued. As the Government of the Netherlands was not willing to bring a claim against the Government of France, some victims launched a private litigation in the courts of the Netherlands in 1974. The litigation continued until 1988 when the case was settled out of court just before the Supreme Court of the Netherlands ruled in favour of the plaintiffs. The settlement was to the tune of US$ 2 million in favour of the cooperatives of the market gardeners. Claims of potable water industry did not succeed in the court of France on the ground that there was no sufficient causal link between the discharge of waste salts and the corrosion damage for which the water industry sought the damage). See also Secretariat Survey of Liability regimes, A/CN.4/543, paras. 399-433.

[474] Lefeber, *Transboundary Environmental Interference, ... ibid.*, p. 260.

(13) Paragraph 5 addresses access to information. This is an important matter without which the principle of equal access envisaged in paragraphs 1, 2 and 3 for victims of transboundary damage cannot be realized expeditiously or without much expense. Paragraph 5 may equally be applicable in respect of international procedures contemplated in paragraph 4. States should collect and maintain the information as part of performance of their duties of due diligence and make it available to those that are interested in seeking the information.[475] Elements of information include: the precise nature of risk, the standards of safety required, financial base of the activity, provisions concerning insurance or financial guarantees the operator is required to maintain, applicable laws and regulations and institutions designated to deal with complaints including complaints about non-compliance with the required safety standards and redress of grievances.

(14) Access to information is an evolving principle. Even in countries with some advanced forms of governance and modern elements of administrative law, development of the concept and making it, in all its varied dimensions, a legally enforceable right is taking time.[476] Such a right of access is contained in several instruments.[477]

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[475] For example, Section 4 of the Right to Information Act, 2005 of India obligates all public authorities to collect and maintain if possible in computerized form all records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act. For the text of Act 22 of 2005, see http://indiacode.nic.in/fullact1.asp?tfnm=200522.

[476] The Scandinavian countries, the countries in the European Union and the United States have progressed along the route to make the right of access to information but there is still a lot that needs to be achieved even in the context of those countries, and even more so in other jurisdictions, see S. Coliver, P. Hoffman, J. Fitzpatrick and S. Bowen (eds.) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (The Hague: Kluwer Academic Publishers, 1999); U. Oberg, EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act, *Cambridge Yearbook of European Legal Studies*, vol. 2 (2000), p. 303. "Right to know" laws have been enacted in at least 25 United States States and in Canada. For information on these and other initiatives and analysis of the right of access to information, see Peter H. Sand, "Information Disclosure as an Instrument of Environmental Governance", *Zeitschrift fur ausländisches öffentlisches Recht und Völkerrecht*, vol. 63 (2003), pp. 487-502. On the availability of the right to information in the context of access to environmental justice in New Zealand, see Justice Peter Salmon, "Access to Environmental justice", N.Z.J. Environmental Law, vol. 2 (1998), pp. 1-23, pp. 9-11. The World Bank is also implementing procedures to promote public disclosure of operational information concerning the projects it supports worldwide. See I.F.I. Shihata, *The World Bank Inspection Panel* (1994).

[477] See: the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, which is in force since 30 October 2001, the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (article 9), 1993 Lugano Convention on Environmental Liability (articles 15 and 16), the 1995 UN/ECE Sofia Guidelines on access to information and public participation in environmental decision-making (articles 4 and 5); the EU Council/Parliament Directive 2003/4/EC of 28 January 2003. See also Secretariat Survey of Liability Regimes, document A/CN.4/543, paras. 287-336.

(15) The reference to "appropriate" access in paragraph 5 is intended to indicate that in certain circumstances access to information or disclosure of information may be denied. It is, however, important that even in such circumstances information is readily made available concerning the applicable exceptions, the grounds for refusal, procedures for review, and the charges applicable, if any. Where feasible, such information should be accessible free of charge or with minimal expenses.

(16) Also implicated in the present draft principles is the question of recognition and enforcement of foreign judgments and arbitral awards. Such recognition and enforcement would be essential to ensure the effects of decisions rendered in jurisdictions in which the defendant did not have enough assets for victims to recover compensation in other jurisdictions where such assets are available. Most States subject the recognition and enforcement of foreign judgments and arbitral awards to specific conditions prescribed in their law or enforce them in accordance with their international treaty obligations. Generally, fraud, no fair trial, public policy, irreconcilability with the earlier decisions could be pleaded as grounds to deny recognition and enforcement of foreign judgments and arbitral awards. Other conditions may apply or possibilities exist.[478]

Principle 7

Development of specific international regimes

> 1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.
>
> 2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry based funds.

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[478] For example, the US District Court which dismissed the Indian claims for compensation in the Bhopal case, on grounds of forum non-convenience, and referred the plaintiffs to courts in India, stipulated that judgments rendered in India could be enforced in the United States, Lefeber, *Transboundary Environmental Interference ..., op. cit.*, pp. 267-268.

Commentary

(1) Draft principle 7 corresponds to the set of provisions contained in draft principle 4, except that they are intended to operate at international level. It builds upon principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration. Paragraph 1 encourages States to conclude specific global, regional or bilateral agreements where such approaches would provide the most effective arrangements in areas which the present principles are concerned about: (a) compensation; (b) response measures; and (c) redress and remedies.

(2) Paragraph 2 encourages States, as appropriate, to include in such arrangements various financial security schemes whether through industry funds or State funds in order to make sure that there is supplementary funding for victims of transboundary damage. It points to the need for States to enter into specific arrangements and tailor them to the particular circumstances of individual hazardous activities. It also recognizes that there are several variables in the regime concerning liability for transboundary damage that are best left to the discretion of individual States or their national laws or practice to select or choose, given their own particular needs, political realities and stages of economic development. Arrangements concluded on a regional basis with respect to specific category of hazardous activities are likely to be more fruitful and durable in protecting the interest of their citizens, the environment and natural resources on which they are dependent.

(3) It may also be recalled that from the very inception of the topic, the Commission proceeded on the assumption that its primary aim was "to promote the construction of regimes to regulate without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects".[479]

Principle 8

Implementation

1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.

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[479] *Yearbook ... 1980*, vol. II (Part One) p. 247, Preliminary Report, doc. A/CN.4/334, p. 250, para. 9.

2. The present draft principles and the measures adopted to implement them shall be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles.

Commentary

(1) Paragraph 1 restates what is implied in the other draft principles; namely that each State should adopt legislative, regulatory and administrative measures for the implementation of these draft principles. It intends to highlight the significance of national implementation through domestic legislation of international standards or obligations agreed to by States parties to international arrangements and agreements.

(2) Paragraph 2 emphasizes that these draft principles and any implementing provisions shall be applied without any discrimination on any grounds prohibited by international law. The emphasis on "any" is intended to denote that discrimination on any such ground is not valid. The references to nationality, domicile or residence are only illustrative. For example, discrimination on the basis of race, gender, religion or belief would obviously be precluded as well.

(3) Paragraph 3 is a general hortatory clause, which provides that States should cooperate with each other to implement the present draft principles. It is modelled on article 8 of the Kiev Protocol. The importance of implementation mechanisms cannot be overemphasized. From the perspective of general and conventional international law it operates at the international plane essentially as between States and that it requires to be implemented at the national level through specific domestic constitutional and other legislative techniques. It is important that States enact suitable domestic legislation to implement these principles, lest victims of transboundary damage be left without adequate recourse.

CHAPTER VI

SHARED NATURAL RESOURCES

A. Introduction

68. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur.[480] A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[481] The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.[482]

69. From its fifty-fifth (2003) to fifty-seventh (2005) sessions, the Commission received and considered three reports from the Special Rapporteur.[483] During this period, the Commission established two working groups, one in 2004, chaired by the Special Rapporteur, to assist in furthering the Commission's consideration of the topic and the other, in 2005, chaired by Mr. Enrique Candioti, to review and revise the 25 draft articles on the law of transboundary aquifers proposed by the Special Rapporteur in his Third report (A/CN.4/551 and Corr.1 and Add.1) taking into account the debate in the Commission. The 2005 Working Group did not complete its work.

B. Consideration of the topic at the present session

70. At the present session, the Commission decided, at its 2868th meeting, on 2 May 2006, to reconvene the Working Group on Shared Natural Resources, chaired by Mr. Enrique Candioti. The Working Group held five meetings and completed the review and revision of the draft

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[480] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 518-519. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work.

[481] *Ibid., Fifty-fifth Session, Supplement 10* (A/55/10), Annex, p. 314.

[482] *Ibid., Fifty-seventh Session, Supplement 10* (A/57/10 and Corr.1), para. 529.

[483] A/CN.4/533 and Add.1 (First report), A/CN.4/539 and Add.1 (Second report), and A/CN.4/551 and Corr.1 and Add.1 (Third report).

articles submitted by the Special Rapporteur in his Third report. At the 2878th meeting of the Commission, on 18 May 2006, the Chairman of the Working Group submitted the report of the Working Group containing in its annex 19 revised draft articles.

71. The Commission, at its 2878th and 2879th meetings, on 18 and 19 May 2006, considered the report of the Working Group; and at the latter 2879th meeting decided to refer the 19 draft articles to the Drafting Committee.

72. The Commission considered the report of the Drafting Committee at its 2885th meeting, on 9 June 2006, and adopted on first reading draft articles on the law of transboundary aquifers consisting of 19 draft articles and at its 2903rd, 2905th and 2906th meetings on 2, 3 and 4 August 2006, adopted commentaries thereto.

73. At its 2903rd meeting, on 2 August 2006, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see section C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008.

74. At its 2906th meeting, on 4 August 2006, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Chusei Yamada had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the law of transboundary aquifers. It also acknowledged the untiring efforts and contribution of the Working Group on Shared Natural Resources under the Chairmanship of Mr. Enrique Candioti, as well as the various briefings during the development of the topic by experts on groundwaters from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), the Economic Commission for Europe (UNECE) AND THE International Association of Hydrogeologists (IAH).

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading

1. Text of the draft articles

75. The text of the draft articles adopted by the Commission on first reading is reproduced below.

PART I

INTRODUCTION

Article 1

Scope

The present draft articles apply to:

(*a*) utilization of transboundary aquifers and aquifer systems;

(*b*) other activities that have or are likely to have an impact upon those aquifers and aquifer systems; and

(*c*) measures for the protection, preservation and management of those aquifers and aquifer systems.

Article 2

Use of terms

For the purposes of the present draft articles:

(*a*) "aquifer" means a permeable water-bearing underground geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

(*b*) "aquifer system" means a series of two or more aquifers that are hydraulically connected;

(*c*) "transboundary aquifer" or "transboundary aquifer system" means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

(*d*) "aquifer State" means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;

(*e*) "recharging aquifer" means an aquifer that receives a non-negligible amount of contemporary water recharge;

(*f*) "recharge zone" means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;

(*g*) "discharge zone" means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

PART II

GENERAL PRINCIPLES

Article 3

Sovereignty of aquifer States

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with the present draft articles.

Article 4

Equitable and reasonable utilization

Aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization, as follows:

(*a*) they shall utilize the transboundary aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;

(*b*) they shall aim at maximizing the long-term benefits derived from the use of water contained therein;

(*c*) they shall establish individually or jointly an overall utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and

(*d*) they shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Article 5

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of draft article 4 requires taking into account all relevant factors, including:

(*a*) the population dependent on the aquifer or aquifer system in each aquifer State;

(*b*) the social, economic and other needs, present and future, of the aquifer States concerned;

(*c*) the natural characteristics of the aquifer or aquifer system;

(*d*) the contribution to the formation and recharge of the aquifer or aquifer system;

(*e*) the existing and potential utilization of the aquifer or aquifer system;

(*f*) the effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;

(*g*) the availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;

(*h*) the development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;

(*i*) the role of the aquifer or aquifer system in the related ecosystem.

2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

Article 6

Obligation not to cause significant harm to other aquifer States

1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States.

2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact on that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States.

3. Where significant harm nevertheless is caused to another aquifer State, the aquifer States whose activities cause such harm shall take, in consultation with the affected State, all appropriate measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

Article 7

General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifer or aquifer system.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

Article 8

Regular exchange of data and information

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system, as well as related forecasts.

2. Where knowledge about the nature and extent of some transboundary aquifer or aquifer systems is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer systems, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.

3. If an aquifer State is requested by another aquifer State to provide data and information relating to the aquifer or aquifer systems that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

PART III

PROTECTION, PRESERVATION AND MANAGEMENT

Article 9

Protection and preservation of ecosystems

Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the- quality and quantity of water retained in the aquifer or aquifer system, as well as that released in its discharge zones, are sufficient to protect and preserve such ecosystems.

Article 10

Recharge and discharge zones

1. Aquifer States shall identify recharge and discharge zones of their transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the recharge and discharge processes.

2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system.

Article 11

Prevention, reduction and control of pollution

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifer or aquifer system, including through the recharge process, that may cause significant harm to other aquifer States. In view of uncertainty about the nature and extent of transboundary aquifers or aquifer systems and of their vulnerability to pollution, aquifer States shall take a precautionary approach.

Article 12

Monitoring

1. Aquifer States shall monitor their transboundary aquifer or aquifer system. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with the competent international organizations. Where, however, monitoring activities are not carried out jointly, the aquifer States shall exchange the monitored data among themselves.

2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifer or aquifer system. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifer or aquifer system. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifer and aquifer system.

Article 13

Management

Aquifer States shall establish and implement plans for the proper management of their transboundary aquifer or aquifer system in accordance with the provisions of the present draft articles. They shall, at the request by any of them, enter into consultations concerning the management of the transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

PART IV

ACTIVITIES AFFECTING OTHER STATES

Article 14

Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body to make an impartial assessment of the effect of the planned activities.

PART V

MISCELLANEOUS PROVISIONS

Article 15

Scientific and technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, technical and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems. Such cooperation shall include, *inter alia*:

(*a*) Training of their scientific and technical personnel;

(*b*) Facilitating their participation in relevant international programmes;

(*c*) Supplying them with necessary equipment and facilities;

(*d*) Enhancing their capacity to manufacture such equipment;

(*e*) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

(*f*) Providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting transboundary aquifers or aquifer systems;

(*g*) Preparing environmental impact assessments.

Article 16

Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that poses an imminent threat of causing serious harm to aquifer States or other States.

2. Where an emergency affects a transboundary aquifer or aquifer system and thereby poses an imminent threat to States, the following shall apply:

(*a*) The State within whose territory the emergency originates shall:

(i) without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(ii) in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency;

(*b*) States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available trained emergency response personnel, emergency response equipments and supplies, scientific and technical expertise and humanitarian assistance.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

Article 17

Protection in time of armed conflict

Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.

Article 18

Data and information concerning national defence or security

Nothing in the present draft articles obliges a State to provide data or information the confidentiality of which is essential to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

Article 19

Bilateral and regional agreements and arrangements

For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into a bilateral or regional agreement or arrangement among themselves. Such agreement or arrangement may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as the agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

2. Text of the draft articles with commentaries thereto

76. The texts of the draft articles with commentaries thereto on the law of transboundary aquifers as adopted by the Commission on first reading at its fifty-eighth session, are reproduced below.

The Law of Transboundary Aquifers

General commentary

(1) At its fifty-fourth session (2002), the International Law Commission decided on the inclusion in the programme of work of the Commission of the topic entitled "Shared Natural Resources". It was generally understood that this topic included groundwaters, oil and natural gas, while some preferred to include also such resources as migratory birds and animals on one hand and some others preferred to limit it so as to deal solely with groundwaters on the other.

(2) The Special Rapporteur of the topic considered that it would be appropriate to begin with the consideration of groundwaters as the follow-up of the Commission's previous work on the codification of the law of surface waters[484] and also that it would complicate the work if the Commission was to deal with three different resources simultaneously. Accordingly, he decided to focus on transboundary groundwaters for the time being and at least during the first reading of the draft articles. This approach has been generally endorsed. He is nevertheless aware of some common characteristics among these three different resources, in particular between non-renewable groundwaters contained in non-recharging aquifers on one hand and oil and natural gas on the other. While he is also aware of dissimilarities among these resources, he recognises that the work on transboundary groundwaters could affect any future codification work by the Commission on oil and natural gas. Moreover, the Commission might also wish to take into account some relevant elements of the existing regulations and State practice on oil and natural gas before finalizing its work on transboundary groundwaters. He therefore proposed to consider this aspect during the second reading of the draft articles. One member held the view that the decision would have to be taken whether to proceed further with respect to oil and natural gas when that second reading is completed.

(3) The first reading text is provisionally presented in the form of draft articles. Consistent with the practice of the Commission, the term "draft articles" has been used without prejudice as to the final form of the product, whether it should be a convention or otherwise. The question of the final form that the draft articles should take is of course a matter that is of relevance to the formulation of the text of draft articles and should be addressed in due course while focus has been on the substance at this stage. The Commission took the view that it was still premature to reach a conclusion on the question of final form in light of the differing views expressed by States in the Sixth Committee. The draft articles presented thus do not include provisions on dispute settlement, final clauses and any article which might prejudice the issue of final form. If a decision is taken to proceed with a convention, other changes would likely be necessary on second reading, including specifying the relationship of the convention to other agreements and arrangements, and relations with non-parties.

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[484] 1997 United Nations Convention on the Law of Non-navigational Uses of International Watercourses.

(4) The Commission considered the question of whether it would be necessary to structure the draft articles in such a way as to have obligations that will apply to all States generally, obligations of aquifer States *vis-à-vis* other aquifer States and obligations of aquifer States *vis-à-vis* non-aquifer States. It was decided that, in order to be effective, some draft articles would have to impose obligations on States which do not share the transboundary aquifer in question and in certain cases give rights to the latter States towards the States of that aquifer. In reaching these conclusions, the Commission stressed the need to protect the transboundary aquifer or aquifer system.

(5) The draft articles rely to a large extent on the 1997 Watercourses Convention. Some argue there exist differences between surface waters and groundwaters. Others contend that the Convention was a failure because it has not attracted the ratifications necessary for it to come into force. There are of course differences between these two resources. However, there are more similarities between them, in particular in the way of managing these resources. It is true that the Convention has not yet come into force.[485] However it was a framework convention reflecting a certain authority. The International Court of Justice recognized such authority when it referred to the Convention in its judgment in the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*.[486] Many substantive provisions of the 2000 Revised Protocol on Shared Watercourses in Southern African Development Community (SADC) reproduce almost word for word the provisions of the Convention and they are being implemented.[487] The Convention thus offers a useful basis for codification of transboundary groundwaters.

(6) There are also abundant treaties and other legal documents which provide useful inputs to the current work. Those instruments are compiled by the Food and Agriculture Organization (FAO) in association with the United Nations Educational, Scientific and Cultural Organization (UNESCO)[488] and relevant parts are reproduced in the addendum to the Third Report of the

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[485] Article 36, 1 reads as follows: "the present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession …". As at 6 August 2006, 14 States had become parties. They are Finland, Hungary, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Namibia, Netherlands, Norway, Portugal, Qatar, South Africa, Sweden and Syrian Arab Republic.

[486] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, para. 85.

[487] Entry into force: 22 September 2003. Parties and/or signatories: Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

[488] S. Burchi and K. Mechlem, *Groundwater in International Law: Compilation of Treaties and Other Legal Instruments* (FAO/UNESCO, 2005).

Special Rapporteur.[489] It has been ascertained that almost all States with land borders also have transboundary groundwaters with their neighbours. Accordingly, most States have a stake also in one way or another in the topic. Substantial State practice is emerging. In addition to the valuable contributions from various States, the UNESCO International Hydrological Program (IHP) has since the year 2003 provided scientific and technical advice to the Special Rapporteur and the Commission on the issues related to hydrogeology, inviting, coordinating and supporting the contributions of international experts, international and national institutions, including centres on groundwater resources, International Association of Hydrogeologists (IAH), FAO, United Nations Environment Programme/Global Environmental Fund (UNEP/GEF), Organization of American States (OAS), International Union for the Conservation of Nature and Natural Resources (IUCN), International Groundwater Resources Assessment Centre (IGRAC) and United Nations Economic Commission for Europe (ECE) to which the Special Rapporteur and the Commission are sincerely grateful.

PART I

INTRODUCTION

Article 1

Scope

The present draft articles apply to:

(*a*) Utilization of transboundary aquifers and aquifer systems;

(*b*) Other activities that have or are likely to have an impact upon those aquifers and aquifer systems; and

(*c*) Measures for the protection, preservation and management of those aquifers and aquifer systems.

Commentary

(1) Draft article 1 provides the scope to which the present draft articles apply. The term "groundwaters" has been consistently used in the Commission and in the United Nations General Assembly. While it is perfectly appropriate to commonly denote a body of underground waters that constitutes a unitary whole and could be extracted for human use as "groundwaters",

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[489] Document A/CN.4/551/Add.1.

for the purposes of the present draft articles the technical term "aquifer" is opted for, as the term is more scientifically precise and leaves no ambiguity for both lawyers and groundwater scientists and administrators. An aquifer is often hydraulically connected to one or more other aquifers. In such a case, these aquifers must be treated as a single system for proper management as there is hydraulic consistency between them. This series of two or more aquifers is termed an "aquifer system". In the draft articles, "an aquifer" and "an aquifer system" are always used together.

(2) The mandate given to the Commission is to codify the law on "shared natural resources". Accordingly, the present draft articles will apply only to transboundary aquifers. Domestic aquifers are excluded from the scope. If the domestic aquifers are connected to international watercourses as defined in the 1997 Watercourses Convention, they will be governed by that Convention and not by the present draft articles. On the other hand, all the transboundary aquifers will be governed by the present draft articles, regardless of whether they are hydraulically connected or not to international watercourses. Those transboundary aquifers that are hydraulically connected to international watercourses will be governed by the 1997 Watercourses Convention in accordance with its article 2 (a) and also by the present draft articles. The dual application of the provisions of these two legal regimes to such aquifers would not in principle cause any problem, as these legal regimes would not be expected to be in conflict with each other. Were there conflicts between them, it would become necessary to address such situation. However, in order not to prejudge the final form of the draft articles, the relationship between the 1997 Watercourses Convention and the present draft articles is not dealt with for the moment.

(3) Draft article 1 specifies, in subparagraphs (a) to (c), three different categories of activities which must be covered by the draft articles. The activities regulated by article 1 of the 1997 Watercourses Convention are (i) the uses of the resources and (ii) measures of protection, preservation and management related to the uses of those resources. They are substantially reproduced in paragraphs (a) and (c) of this draft article.

(4) In subparagraph (a), the term "utilization" instead of "uses" is adopted as "utilization" would include also the mode of uses. It is noted that the 1997 Watercourses Convention adopts the phrase "international watercourses and of their waters" to indicate that the articles apply both to the watercourse itself (channel or system of surface waters and groundwaters) and to its

waters, to the extent that there may be any difference between the two. Such consideration is not necessary in this paragraph because the definition of an "aquifer" in draft article 2 makes it clear that an aquifer consists of both geological formation and waters contained therein.

(5) In subparagraph (c), "measures for protection, ..." was considered more appropriate than "measures of protection, ..." in the comparable provision of the 1997 Watercourses Convention and also the phrase "relating to uses of" found in the Convention was deleted to widen the scope of the present draft articles. The "measures" are meant to embrace not only those to be taken to deal with degradation of aquifers but also the various forms of cooperation, whether or not institutionalized, concerning the utilization, development, conservation and management of transboundary aquifers.

(6) In addition to these two categories of activities, subparagraph (b) provides an additional category of "other activities that have or likely to have an impact upon aquifers and aquifer systems". In the case of aquifers, it would be necessary to regulate activities other than utilization of aquifers in order to properly manage them. Such activities are those that are carried out above or around aquifers and cause some adverse effects on them. For example, farming, utilizing chemical fertilizer and pesticide may pollute waters in the aquifer. Construction of subways may destroy geological formation or impair recharge or discharge process. There must of course be a causal link between the activities and their effects. The term "impact" is often used to express such adverse or negative effects in the field of environment, for instance "impact assessment".

(7) "Impact" is broader than the concept of "harm" or "damage" which is more specific. In and of itself, the term "impact" does not relate to either a positive or negative effect. However, the term "impact" may be understood to have a negative connotation if the context in which it is used is negative as in the case of subparagraph (b). Accordingly, in the context of subparagraph (b), "impact" relates to a forceful, strong or otherwise substantial adverse effect, while the threshold of such effect is not defined here. The determination of the threshold is left to later substantive draft articles such as draft articles 6 and 10. Impact upon aquifers would include deterioration of water quality, reduction of water quantity and adverse change of functioning of aquifer. The assessment of whether an "impact" occurred, as well as the type of impact and the extent of impact, must be based on measurements prepared prior to the impact

and then compared to measurements after the impact. The measurements prepared prior to the impact provide a baseline or reference level that can be used to compare against subsequent measurements.

Article 2

Use of terms

For the purposes of the present draft articles:

(*a*) "aquifer" means a permeable water-bearing underground geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

(*b*) "aquifer system" means a series of two or more aquifers that are hydraulically connected;

(*c*) "transboundary aquifer" or "transboundary aquifer system" means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

(*d*) "aquifer State" means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;

(*e*) "recharging aquifer" means an aquifer that receives a non-negligible amount of contemporary water recharge;

(*f*) "recharge zone" means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;

(*g*) "discharge zone" means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

Commentary

(1) There are various definitions of aquifer and groundwaters in existing treaties and other international legal documents[490] but they are not precise enough for the purposes of the present

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[490] Article 2, paragraph 11 of EC Directive 2000/60 of 23 October Establishing a Framework for Community Action in the Field of Water Policy:

> "Aquifer" means a subsurface layer or layers of rock or other geological strata of sufficient porosity and permeability to allow either a significant flow of groundwater or the abstraction of significant quantities of groundwater.

United Nations Compensation Commission, Glossary, Report and Recommendations made by the Panel of Commissioners concerning the Third Instrument of "F4" Claims (S/AC.26/2003/31):

> Aquifer: Natural water-bearing geological formation found below the surface of the earth.

draft articles. The definition of an aquifer in subparagraph (a) offers the precise description of the two elements of which an aquifer consists. One element is the underground geological formation which functions as a container for waters. The other element is the waters stored therein which are extractable.

(2) Oil and natural gas are stored also in similar geological formations. The term "water-bearing" has been employed to distinguish coverage of the draft articles from oil and natural gas. "Water-bearing" is not used here in the sense of "capable of bearing waters". It is used to indicate that the formation is currently bearing waters. The water-bearing formation includes both saturated and unsaturated parts of the formation. In other words, "water-bearing" is a wider concept than "saturated". The reference to "underground" is meant to indicate that aquifers are found on the subsurface. A "geological formation" consists of naturally occurring materials, either consolidated or unconsolidated, such as rock, gravel and sand. All the aquifers are underlain by less permeable layers which serve, as they were, as the bottom of container. Some aquifers are also upper-lain by less permeable layers. The waters stored in such aquifers are termed as "confined" groundwaters as they are pressurized by more than atmospheric pressure.

(3) The definition of the waters in an aquifer is limited to those stored in the saturated zone of the geological formation as only those waters are extractable. The waters located above the

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Article 1, paragraph 1 of the Bellagio Draft Agreement Concerning the Use of Transboundary Groundwaters 1989:

> "Aquifer" means a subsurface water bearing geologic formation from which significant quantities of water may be extracted.

Article 3, paragraph 2 of the ILA Berlin Rules on Water Resources, 2004:

> "Aquifer" means a subsurface layer or layers of geological strata of sufficient porosity and permeability to allow either a flow of or the withdrawal of usable quantities of groundwater.

Article 1, paragraph 2 (a) of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances; Article 2 (a) of Council Directive 91/676/EEC of 12 December 1991 Concerning the Protection of Waters Against Pollution Caused by Nitrates from Agricultural Sources; Article 2, paragraph 3 of the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1999; and Article 2, paragraph 2 of EC Directive 2000/60 of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy:

> "Groundwater" means all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.

Article 3, paragraph 11 of the ILA Berlin Rules on Water Resources, 2004:

> "Groundwater" means water beneath the surface of the ground located in a saturated zone and in direct contact with the ground or soil.

saturated zone of the geological formation, like the waters located underground outside an aquifer, are kept in pores and mixed with air and in the form of vapour and cannot be extracted. They are like shale oil. It is of course theoretically possible to separate such waters from air and soil but it is not technically or economically possible to do so at present. The question was raised whether the draft articles should also apply to the formations containing only minimal amounts of waters. While it is obvious that States are not concerned with an aquifer that has no significance to them, it would not be possible to define an absolute criterion for that.

(4) An "aquifer system" consists of two or more aquifers that are hydraulically connected to each other. Those aquifers are not only of the same geological formations but could also be of different geological formations. Aquifers could be hydraulically connected vertically and horizontally as well. "Hydraulically connected" refers to a physical relationship between two or more aquifers whereby an aquifer is capable of transmitting some quantity of water to the other aquifers and vice versa. The quantity of waters that is capable of being transmitted is important since an insignificant or *de minimis* quantity of waters may not translate to a true hydraulic connection. The standard for determining whether a quantity is significant is directly related to the potential of the transmitting aquifer to have an effect on the quantity and quality of waters in the receiving aquifers. It would not be possible to formulate general and absolute criteria for such an effect. A judgment has to be made in each specific case on whether those aquifers should be treated as a system for the proper management of the aquifers.

(5) Subparagraph (c) defines the terms "transboundary aquifer" and "transboundary aquifer system" which are used in draft article 1 on the scope and in many other draft articles. The focus in this paragraph is on the adjective "transboundary". The paragraph provides that, in order to be regarded as a "transboundary" aquifer or aquifer system, parts of the aquifer or aquifer system in question must be situated in different States. Whether parts of an aquifer or aquifer system are situated in different States depends on physical factors. In the case of surface waters, existence of such factors can be easily established by simple observation of rivers and lakes. In the case of groundwaters, the determination of the existence of transboundary aquifers under the jurisdiction of a particular State requires more sophisticated methods, relying on drilling and scientific technology such as isotope tracing to define the outer limit of the aquifers.

(6) Subparagraph (d) defines the term an "aquifer State", which is used throughout the draft articles. Once the existence of a part of a transboundary aquifer or aquifer system is established in the territory under the jurisdiction of a particular State in accordance with the methods referred to in paragraph (5) above, that State is an aquifer State for the purposes of the draft articles.

(7) The definition of "recharging aquifer" in subparagraph (e) is needed because different rules would apply to a "recharging aquifer" and a "non-recharging aquifer". Waters in a recharging aquifer are renewable resources, while those in a non-recharging aquifer are non-renewable resources. For the purposes of management of aquifers, "non-recharging" aquifers are those aquifers that receive "negligible" water recharge "contemporarily". The term "negligible" refers to the transmission of some quantity of waters. The measurement of whether the quantity is "negligible" should be assessed with reference to the specific characteristics of the receiving aquifer, including the volume of waters in the receiving aquifer, the volume of waters discharged from the receiving aquifer (naturally and artificially), the volume of waters that recharges the receiving aquifer, the rate at which the recharge occurs, etc.

(8) The term "contemporary" should be understood for convenience as the time-span of approximately 100 years, 50 years in the past and 50 years in the future. The scientists generally classify those aquifers located in an arid zone where an annual rainfall is less than 200 mm as non-recharging aquifers. It is possible to ascertain whether a particular aquifer has been receiving water recharge during the period of approximately the last 50 years by using radioactive tracers. These tracers are cesium and tritium from nuclear weapons tests with a peak of injection at 1963/1964 and krypton from the continuous emission of the nuclear industry from mid-1950s. They have been floating in the atmosphere for the last 50 years and can be detected in the aquifer that receives recharge from rainfall during that period.

(9) The definitions of "recharge zone" and "discharge zone" in subparagraphs (f) and (g) are needed for the application of draft article 10. Those zones exist for a "recharging aquifer" and are located outside the aquifer although they are hydraulically connected to the latter. A recharge zone contributes water to an aquifer and includes the zone where the rainfall water

directly infiltrates the ground, zone of surface runoff which eventually infiltrates the ground and the underground unsaturated zone of infiltration. The discharge zone is the area through which water from the aquifer flows to its outlet, which may be a river, a lake, an ocean, an oasis or a wetland. Such outlets are not part of the discharge zone itself.

PART II

GENERAL PRINCIPLES

Article 3

Sovereignty of aquifer States

> Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with the present draft articles.

Commentary

(1) The need to have an explicit reference in the form of draft article on the sovereignty of States over the natural resources within their territories was advocated by many States, particularly by those aquifer States that are of the opinion that water resources belong to the States in which they are located and are subject to the exclusive sovereignty of those States. They also pointed out that groundwaters must be regarded as belonging to the States where they are located, along the lines of oil and gas. Reference was made, in that regard, to General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources". Some thought that it would be enough to have a reference to it in the preamble while others considered that such reference would be undesirable for the proper management of aquifers.

(2) Many treaties, other legal instruments and non-legally binding instruments refer to sovereignty of States over natural resources located within their territory.[491] There are basically

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[491] (1) Treaties referring to the concept within their preambles: The Vienna Convention for the Protection of the Ozone Layer (1985); Agreement on Air Quality (Canada-United States) (1991); United Nations Framework Convention of Climate Change (1992); Convention on Biological Diversity (1992); Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994); Convention on the Sustainable Development of Lake Tanganyika (2003);

(2) Treaties referring to the concept within their provisions: Vienna Convention on Succession of States in Respect of Treaties (1978); African (Banjul) Charter on Human and Peoples' Rights (1981); United Nations Convention on the Law of the Sea (1982); Convention for the Protection of the Natural

two types of formulation in State practice with regard to this issue. One type is the positive formulation. Some have limiting conditions to the exercise of this sovereign right. An example is "States have, in accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction".[492] The other type is the saving or disclaimer clause such as "Nothing in this Convention shall affect the sovereign right of States to exploit, develop and manage their own natural resources."[493]

(3) Draft article 3 adopts the positive type and represents an appropriately balanced text. The two sentences in the draft article are necessary in order to maintain such a balance. In essence, each aquifer State has sovereignty over the transboundary aquifer or aquifer system to the extent located within its territory. It is understood also that the present draft articles do not cover all limits imposed by international law on the exercise of sovereignty. Accordingly, the draft articles will have to be interpreted and applied against the background of general international law.

Resources and Environment of the South Pacific Region (1986); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995); Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999); African Convention on the Conservation of Nature and Natural Resources (2003);

(3) Non-binding international instruments referring to the concept: Draft Articles on Prevention on Transboundary Harm from Hazardous Activities (Adopted by the ILC at its fifty-third session, 2001); Concerted action for economic development of economically less developed countries, GA Res. 1515 (XV) (1960); Permanent sovereignty over natural resources, GA Res. 1803 (XVII) (1962); Stockholm Declaration of the United Nations on Human Environment (1972); Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX) (1974); Declaration on the Right to Development, GA Res. 41/128 (1986); Rio Declaration on the Environment and Development (1992);

(4) Other relating treaties: ASEAN Agreement on the Conservation of Nature and Natural Resources (1985, not in force):

[Treaties referring to the concept of peoples' right over the natural resources]

International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); African (Banjul) Charter on Human and Peoples' Rights (1981).

[492] African Convention on the Conservation of Nature and Natural Resources (2003).

[493] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (1986).

Article 4

Equitable and reasonable utilization

Aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization, as follows:

(*a*) they shall utilize the transboundary aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;

(*b*) they shall aim at maximizing the long-term benefits derived from the use of water contained therein;

(*c*) they shall establish individually or jointly an overall utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and

(*d*) they shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Commentary

(1) Transboundary aquifers are shared natural resources. Utilization of the aquifer can be divided into two categories, as the aquifer consists of the geological formation and the waters contained in it. The use of the waters is most common and waters are mainly used for drinking and other human life support, such as sanitation, irrigation and industry. The utilization of the geological formation is rather rare. A typical example is the artificial recharge being undertaken in the Franco-Genevese Aquifer System where the waters from the River Arve are used for such recharge. The functioning of the aquifer treats the waters with less cost than building water treatment installation and also produces high quality water.

(2) The basic principle applicable to the utilization of shared natural resources is equitable and reasonable utilization of the resources. It is embodied in many legal regimes such as water-related treaties and high seas fishery conventions. While the concept of equitable utilization and that of reasonable utilization are different, they are closely interrelated and often combined together in various legal regimes.[494] The chapeau of draft article 4 sets out this principle and the subparagraphs elaborate the meaning of the principle.

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[494] See for example the 1997 Watercourses Convention, article 5 (1).

(3) Subparagraph (a) explains that equitable and reasonable utilization of the transboundary aquifer should result in equitable allocation of benefits to be derived from such utilization among States sharing the aquifer. It is understood that "equitable" is not co-terminus with "equal".

(4) Subparagraphs (b) to (d) mainly concern reasonable utilization. In various legal regimes concerning renewable natural resources, "reasonable utilization" is often defined as "sustainable utilization" or "optimum utilization". There is a well-established scientific definition of this doctrine. It is to take measures on the best scientific evidence available to maintain at, or to restore to, the level of the resources which produces the maximum sustainable yield (MSY).[495] In plain language, it requires measures to keep the resources in perpetuity. In the case of the 1997 Watercourses Convention, it was dealing with the renewable waters which receive substantial recharge. Therefore, sustainable utilization was fully applicable. In the case of aquifers, the situation is entirely different. Waters in non-recharging aquifer are not renewable. Any exploitation of such resources leads to depletion. While waters in recharging aquifers are renewable, the quantity of recharge waters is usually extremely small compared to the large quantity of waters stored in the aquifer over thousands of years. To limit exploitation of waters to the quantity of recharge would be tantamount to prohibiting the utilization of even recharging aquifers.

(5) Subparagraphs (b) and (c) apply to both renewable and non-renewable resources of the aquifer (recharging and non-recharging). The concept of "sustainability" is not appropriate to be explicitly stated in the case of an aquifer. Instead, the concept of maximizing the "long-term benefits" is adopted. The phrase "to maximize long-term benefits" refers to the act of maintaining certain benefits over a long period of time it being understood that utilization cannot be maintained indefinitely. Wasteful utilization must be avoided and the benefits could better be shared among generations. The provisions, however, do not refer to an obligation of maintaining the groundwater resource or the volume of waters in the aquifer at or over some minimum level. Rather, it reflects a conscious decision-making process that determines what constitutes a benefit, what benefits are desirable, how many benefits should be enjoyed and the time period over which benefits should be enjoyed. Such decisions are entirely for the aquifer States concerned to make. In order to maximize long-term benefits, it is a prerequisite to have an

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[495] See UNCLOS, article 118.

overall utilization plan. Therefore, States are required to establish a suitable plan preferably jointly with the other States concerned on the basis of an agreed lifespan of the aquifer. However, the phrase "individually or jointly" has been added to signify the importance of having a prior overall plan, while at the same time stressing that such a plan need not necessarily emanate from a joint endeavour by the aquifer States concerned. In some circumstances, a controlled and planned depletion could be considered.

(6) For a recharging aquifer, it is desirable to plan a much longer period of utilization than in the case of a non-recharging aquifer. However, it is not necessary to limit the level of utilization to the level of recharge. Subparagraph (d) provides that any utilization of such an aquifer should not destroy permanently its capacity to function as an aquifer.

(7) Paragraph 2 of the comparable article 5 of the 1997 Watercourses Convention provides another principle for equitable and reasonable participation[496] by watercourse States which includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof. It is not included here as it serves as an underlying basis for the provisions concerning international cooperation to be formulated in later draft articles.[497]

Article 5

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of draft article 4 requires taking into account all relevant factors, including:

(*a*) The population dependent on the aquifer or aquifer system in each aquifer State;

(*b*) The social, economic, and other needs, present and future, of the aquifer States concerned;

(*c*) The natural characteristics of the aquifer or aquifer system;

(*d*) The contribution to the formation and recharge of the aquifer or aquifer system;

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[496] See paragraphs (5) and (6) of the Commentary to article 5 of the 1997 Watercourses Convention, *Yearbook … 1994*, vol. II (Part Two), p. 97.

[497] Draft articles 7-18.

(*e*) The existing and potential utilization of the aquifer or aquifer system;

(*f*) The effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;

(*g*) The availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;

(*h*) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;

(*i*) The role of the aquifer or aquifer system in the related ecosystem.

2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

Commentary

(1) Draft article 5 lists the factors to be taken into account in determining equitable and reasonable utilization as provided for in draft article 4. "Factors" include "circumstances" and they will be considered in the context of the circumstances surrounding each case. It is a non-exhaustive list and is not based on any particular order of priority. The rules of equitable and reasonable utilization are necessarily general and flexible and require for their proper application that aquifer States take into account concrete factors and circumstances of the resources as well as of the need of the aquifer States concerned. What is an equitable and reasonable utilization in a specific case will depend on a weighing of all relevant factors and circumstances. This draft article is almost a reproduction of article 6 of the 1997 Watercourses Convention.

(2) In subparagraph (c), "natural characteristics" is used instead of listing factors of a natural character of aquifers. The reason for this is that factors of a natural character should be taken into account, not one by one, but as the characteristics of aquifers. Natural characteristics refer to the physical characteristics that define and distinguish a particular aquifer. If a system approach is followed, one can separate the natural characteristics into three categories: input variables, output variables and system variables. Input variables are related to groundwater recharge from precipitation, rivers and lakes. Output variables are related to groundwater

discharge to springs and rivers. System variables relate to aquifer conductivity (permeability) and storability which describe the state of the system. They are groundwater level distribution and water characteristics such as temperature, hardness, pH (acidity and alkalinity), electro-conductivity and total dissolved solids. Together, the three categories of variables describe aquifer characteristics in terms of quantity, quality and dynamics. In effect, these characteristics are identical to those identified in paragraph 1 of draft article 8, on regular exchange of data and information.

(3) Subparagraph (g) relates to whether there are available alternatives to a particular planned or existing utilization of an aquifer. In practice, an alternative would take the form of another source of water supply and the overriding factors would be comparable feasibility, practicability and cost-effectiveness in comparison with the planned or existing utilization of the aquifer. For each of the alternatives a cost-benefits analysis needs to be performed. Beside feasibility and sustainability, the viability of alternatives plays an important role in the analysis. For example, a sustainable alternative could be considered as preferable in terms of aquifer recharge and discharge ratio, but less viable than a controlled depletion alternative.

(4) Subparagraphs (d) and (i) are factors additional to those listed in the 1997 Watercourses Convention. The contribution to the formation and recharge of the aquifer or aquifer system in subparagraph (d) means the comparative size of the aquifer in each aquifer State and the comparative importance of the recharge process in each State where the recharge zone is located. The role of the aquifer in the related ecosystem in subparagraph (i) is a necessarily relevant factor in particular for reasonable utilization. The "role" signifies the variety of purposive functions that an aquifer has in a related ecosystem. This may be a relevant consideration in particular in an arid region. There exist different meanings attached to the term "ecosystem" within the scientific community. The term "related ecosystem" must be considered in conjunction with "ecosystems" in draft article 9. It refers to an ecosystem that is dependent on aquifers or on groundwaters stored in aquifers. Such an ecosystem may exist within aquifers, such as in karstic aquifers, and be dependent on the functioning of aquifers for its own survival. A related ecosystem may also exist outside aquifers and be dependent on aquifers for a certain volume or quality of groundwaters for its existence. For instance an ecosystem in some lakes is dependent on aquifers. Lakes may have a complex groundwater flow system associated with them. Some lakes receive groundwater inflow throughout their entire bed. Some have seepage

loss to aquifers throughout their entire bed. Others receive groundwater inflow through part of their bed and have seepage loss to aquifers through other parts. Lowering of lake water levels as a result of groundwater pumping can affect the ecosystems supported by the lake. The reduction of groundwater discharge to the lake significantly affects the input of dissolved chemicals which can be the principal source to the lake even in cases where such discharge is a small component of the lake's water budget and may result in altering key constituents of the lake, such as nutrients and dissolved oxygen.

(5) The text of the first two sentences of paragraph 2 was formulated during the final negotiating stage of the 1997 Watercourse Convention. It clarifies that all relevant factors are to be considered together and conclusion must be reached on the basis of all of them. It remains, however, that the weight to be accorded to individual factors, as well as their relevance, will vary with the circumstances. Special consideration should be given to drinking waters and other essentials for human needs. The reference in the last sentence of paragraph 2 that special regard shall be given to vital human needs seeks to accommodate these considerations. The different kinds of utilization of water in an aquifer may be numerous especially in arid and semi-arid regions where the aquifer is the only source of water. They are for drinking, agriculture, industry, human domestic needs and support for terrestrial and aquatic ecosystem. When a conflict arises between different kinds of utilization, it should be resolved in accordance with the principle of equitable utilization. In such determination, special regard shall be given to the requirement of "vital human needs". During the elaboration of the 1997 Watercourses Convention, the Chairman of the Working Group of the Whole took note of the following statement of understanding pertaining to "vital human needs": "In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation." This statement seems to be more precise and narrow than other definitions.[498]

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[498] "Vital human needs" means waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household. Article 3 (20) of the International Law Association Berlin Rules on Water Resources, 2004.

Article 6

Obligation not to cause significant harm to other aquifer States

1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States.

2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact on that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States.

3. Where significant harm nevertheless is caused to another aquifer State, the aquifer States whose activities cause such harm shall take, in consultation with the affected State, all appropriate measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

Commentary

(1) Draft article 6 deals with another basic of obligation of aquifer States not to cause harm to other aquifer States. It addresses questions of significant harm arising from utilization and significant harm from activities other than utilization as contemplated in draft article 1 as well as questions of elimination and mitigation of significant harm occurring despite due diligence efforts to prevent such harm.

(2) *Sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another) is the established principle of international liability. The obligation contained in this draft article is that of "to take all appropriate measures". It is in substance the same as the obligation of "due diligence". The change from "due diligence" to "to take all appropriate measures" took place during the last negotiating stage of the 1997 Watercourses Convention. It is an obligation of conduct and not an obligation of result. An aquifer State has breached this obligation only when it has intentionally or negligently caused the event that must be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. In the case of paragraph 1, it is implicit that the harm is caused to other States through transboundary aquifers. In the case of paragraph 2, it is expressly made clear that the draft article applies only to the harm that is caused to other States "through that aquifer or aquifer system".

(3) The debate continues whether the threshold of "significant harm" is appropriate for such fragile natural resources as aquifers. The view has been expressed widely that a lower threshold than "significant" harm is required for aquifers that are more fragile and, once polluted, take longer to clean than surface rivers. The Commission had considered this question of the threshold extensively in its previous codification works on the "1997 Watercourses Convention" and "Prevention of transboundary damage from hazardous activities" within the framework of the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" and had established a position on the threshold of "significant harm".

(4) During the elaboration of the draft Convention on the Law of Non-navigational Uses of International Watercourses, the Chairman of the Working Group of the Whole took note of the statements of understanding to the texts of the Convention. On the term "significant", the following understanding was recorded. The term "significant" is not used in this article or elsewhere in the present Convention in the sense of "substantial". What is to be avoided are localized agreements, or agreements concerning a particular project, programme or use, that have a significant adverse effect upon third watercourse States. While such an effect must be capable of being established by objective evidence and not be trivial in nature, it needs not rise to the level of being substantial.[499] The threshold of "significant harm" is a flexible and relative concept and can serve as an appropriate threshold also for aquifers. Even when an aquifer is contaminated by a small amount of pollutant, the harm it may suffer could be evaluated as significant if the contamination has long-lasting effects, while the contamination of a watercourse by the same amount of pollutant might not be evaluated as significant.

(5) This draft article is intended to cover activities undertaken in a State's own territory. The scenario where an aquifer State would cause harm to another State through an aquifer by engaging in activities outside its territory is considered unlikely, but is not excluded.

(6) Paragraph 3 deals with the eventuality of significant harm even if all appropriate measures are taken. The reference to "activities" in paragraph 3 covers both "utilization" and "other activities" in paragraphs 1 and 2. That eventuality is possible because activities have a risk of causing harm and such risk cannot be eliminated. The reference to the question of

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[499] See A/51/869.

compensation found in the corresponding article of the 1997 Watercourses Convention is not included. The Commission decided not to address in these draft articles the issue of compensation in circumstances where harm resulted despite efforts to prevent such harm. The issue is covered by other rules of international law, including the draft principles on liability and does not require specialized treatment with respect to transboundary aquifers.

Article 7

General obligation to cooperate

> 1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifer or aquifer system.
>
> 2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

Commentary

(1) Draft article 7 sets out the principle of a general obligation of the aquifer States to cooperate with each other and contemplates procedures for such cooperation. Cooperation among aquifer States is a prerequisite for the fulfilment of the obligations throughout the draft articles. The importance of the obligation to cooperate is indicated in Principle 24 of the Stockholm Declaration on the Human Environment (1972). The importance of such an obligation for the present subject is confirmed by the United Nations Water Conference in Mar del Plata Action Plan in 1977 and Chapter 18, Protection of the Quality and Supply of Freshwater Resources; Application of Integrated Approaches to the Development, Management and Use of Water Resources of Agenda 21 of the United Nations Conference on Environment and Development (1992). A wide variety of international instruments on surface waters and groundwater issues call for cooperation between the parties with regard to the protection, preservation and management of transboundary aquifers.[500]

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[500] ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), Convention on the Protection of Transboundary Watercourses and International Lakes (the Helsinki Convention, 1992), Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1999), Convention on Cooperation for the Sustainable Use of the River Danube (1994), Convention on the Protection of the Rhine (1999), African Convention on the Conservation of Nature and Natural Resources (2003), Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), Convention on

(2) Paragraph 1 provides for the basis and objectives of cooperation and reproduces more or less the text of article 8 of the 1997 Watercourses Convention. To some members of the Commission, the question remains as to whether the principles of "sovereign equality" and "territorial integrity" could better be reflected elsewhere in the draft articles rather than in the context of the cooperation provision. The principle of "sustainable development" has been included as a general principle that ought to be taken into account as well in addition to the text of the 1997 Watercourses Convention. The term "sustainable development" denotes the general principle of sustainable development and should be distinguished from the concept of "sustainable utilization".[501]

(3) Paragraph 2 envisages the establishment of "joint mechanisms for cooperation" which refers to a mutually agreeable means of decision-making among aquifer States. In practical terms, it means a commission, an authority or other institution established by the aquifer States concerned to achieve a specified purpose. The competence of such a body would be for the aquifer States concerned to determine. The objectives in creating such a mechanism is to cooperate in decision-making, to coordinate activities and to avert, to the extent possible, disputes among aquifer States.

(4) Europe has a long tradition of international river commissions such as the International Commission for the Protection of the Rhine, the Maas Commission, the Danube Commission, etc. Within these commissions or in close cooperation with them, bilateral cross-border commissions such as the Permanent Dutch-German Cross-border Water Commission operate. The existing commissions deal primarily with surface water issues. The EU Water Framework Directive 2000/60/EC[502] is implemented mainly through commissions for delineation and monitoring. In the future, these commissions will become responsible for transboundary aquifer management as well.[503] In other parts of the world, it is also expected that comparable regional

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the Sustainable Development of Lake Tanganyika (2003), and Protocol for Sustainable Development of Lake Victoria Basin (2003).

[501] See paragraph (4) of the commentary to draft article 4.

[502] The Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy was adopted in October 2000.

[503] The EU Water Framework Directive requires Member States to establish management plan. See also guidelines 2 and 8 of the Guidelines on Monitoring and Assessment of Groundwaters of the ECE (2000).

organizations play a role in promoting establishment of similar joint mechanisms.[504] It is also noted that there are many cases of joint mechanisms established by local governments along the border.[505]

Article 8

Regular exchange of data and information

> 1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system, as well as related forecasts.
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> 2. Where knowledge about the nature and extent of some transboundary aquifer or aquifer systems is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer systems, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.
>
> 3. If an aquifer State is requested by another aquifer State to provide data and information relating to the aquifer or aquifer systems that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
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> 4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

Commentary

(1) Regular exchange of data and information is the first step for cooperation among aquifer States. The text of article 9 of the 1997 Watercourses Convention has been adjusted to meet the special characteristics of aquifers. In particular, paragraph 2 is additionally formulated in view of the insufficient status of scientific findings of some aquifers. There are several stages for the

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[504] African Union: Article VII - Water, Paragraph 3 of African Convention on the Conservation of Nature and Natural Resources (Maputo, 11 July 2003) and SADC: Article 5-Institutional framework for implementation of Revised Protocol on Shared Watercourses in the Southern African Development Community (Windhoek, 7 August 2000).

[505] Franco-Swiss Commission on the Genevese Aquifer established by Canton de Genève and Prefecture de Haute Savoie and Memorandum of Agreement Related to Referral of Water Right Applications (10 October 1996) - Appendix to British Columbia/Washington Memorandum of Understanding (12 April 1996).

exchange of data and information throughout the draft articles. Data and information in this draft article are limited to those concerning the conditions of aquifers. They include not only raw statistics but also the results of research and analysis. Data and information concerning monitoring, utilization of aquifers, other activities affecting aquifers and their impact on aquifers are dealt with in later draft articles, including draft articles 12, 13 and 14.

(2) Draft article 8 sets out the general and minimum requirements for the exchange between aquifer States of the data and information necessary to ensure the equitable and reasonable utilization of transboundary aquifers. Aquifer States require data and information concerning the condition of the aquifer in order to apply draft article 5, which calls for aquifer States to take into account "all relevant factors" and circumstances in implementing the obligation of equitable and reasonable utilization laid down in draft article 4. The rules contained in draft article 8 are residual. They apply in the absence of specially agreed regulation of the subject and they do not prejudice the regulation set out by an arrangement concluded among the States concerned for a specific transboundary aquifer. In fact, the need is clear for aquifer States to conclude such agreements among themselves in order to provide, *inter alia*, for the collection and exchange of data and information in the light of the characteristics of the transboundary aquifer concerned.

(3) The requirement of paragraph 1 that data and information be exchanged on a regular basis is designed to ensure that aquifer States will have the facts necessary to enable them to comply with their obligations under draft articles 4, 5 and 6. In requiring the "regular" exchange of data and information, paragraph 1 provides for an ongoing and systematic process, as distinct from the ad hoc provision of such information as concerning planned activities envisaged in draft article 14. Paragraph 1 requires that aquifer States exchange data and information that are "readily available". This expression is used to indicate that, as a matter of general legal duty, an aquifer State is under an obligation to provide only such data and information as is at its disposal readily, for example that it has already collected for its own use or is easily accessible. In a specific case, whether data and information are "readily" available would depend upon an objective evaluation of such factors as the efforts and costs which their provision would entail, taking into account the human, technical, financial and other relevant resources of the requested aquifer State. The term "readily", as used in paragraphs 1 and 3, is thus a term of art having a

meaning corresponding roughly to the expression "in the light of all the relevant circumstances" or to the word "feasible", rather than, for example, "rationally" or "logically". The importance of the exchange of data and information is indicated in a wide variety of agreements.[506]

(4) The phrase in paragraph 1 "in particular of geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system" relate to the data and information that define and distinguish characteristics of the aquifer. "Geology" describes age, composition and structure of the aquifer matrix. "Hydrogeology" describes the ability of the aquifer to store, transmit and discharge groundwaters. "Hydrology" describes elements other than groundwaters of the water cycle, primarily effective precipitation and surface water that are important for aquifer recharge, the aquifer regime, storage and discharge. Effective precipitation is the part of precipitation which enters aquifers. In other words, it is total precipitation minus evaporation, surface runoff and vegetation. "Meteorology" provides data on precipitation, temperature and humidity which is necessary to calculate evaporation. "Ecology" provides data on plants necessary to calculate plants transpiration. "Hydrochemistry" yields data on chemical composition of the water necessary to define water quality. Aquifer States are required by paragraph 1 to exchange not only data and information on the present condition of the aquifer, but also related forecasts. The forecasts envisaged would relate to such matters as weather patterns and the possible effects thereof upon water levels and flow; the amount of recharge and discharge; foreseeable ice conditions; possible long-term effects of present utilization; and the condition or movement of living resources. The requirement in paragraph 1 applies even in the relatively rare instances in which an aquifer State is not utilizing, or has no plan of utilizing, the transboundary aquifer.

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[506] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (the Helsinki Convention, 1992), Programme for the Development of a Regional Strategy for the Utilization of the Nubian Sandstone Aquifer System (NSAS, 2000), Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), African Convention on the Conservation of Nature and Natural Resources (2003), Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994), Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002), Framework Agreement on the Sava River Basin (2002), Convention on the Sustainable Development of Lake Tanganyika (2003), Protocol for Sustainable Development of Lake Victoria Basin (2003), Protocol Amending the 1978 Agreement between the United States of America and Canada on Great Lakes Water Quality, as Amended in 1983, and Agreement on Cooperation for the Protection and Sustainable Use of the Water of the Spanish-Portuguese Hydrographic Basins (1998).

(5) Paragraph 2 requires aquifer States to pay due regard to the uncertainties of transboundary aquifers. One of the difficulties in realizing effective international cooperation in the present subject is the uncertainty of scientific knowledge about transboundary aquifers. The aquifer States are required to cooperate with each other or with relevant international organizations in order to collect new data and information and make such data and information available to other aquifer States. The concept of "generation" of data involves the processing of raw data into usable information. UNESCO-IHP compiles reliable global data and information, including aquifer locations and characteristics and makes them available to scientific and management community of aquifers.

(6) Paragraph 3 concerns requests for data or information that are not readily available in the State from which they are sought. In such cases, the State in question is to employ its "best efforts" to comply with the request. It is to act in good faith and in a spirit of cooperation in endeavouring to provide the data or information sought by the requesting aquifer State. In the absence of agreement to the contrary, aquifer States are not required to process the data and information to be exchanged. Under paragraph 3 of draft article 8, however, they are to employ their best efforts to comply with the request. But the requested State may condition its compliance with the request on payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing the data. The expression "where appropriate" is used in order to provide a measure of flexibility, which is necessary for several reasons. In some cases, it may not be necessary to process data and information in order to render it usable by another State. In other cases, such processing may be necessary in order to ensure that the material is usable by other States, but this may entail undue burdens for the State providing the material.

(7) For data and information to be of practical value to aquifer States, they must be in a form which allows them to be easily usable. Paragraph 4 therefore requires aquifer States to use their "best efforts to collect and to process data and information in a manner which facilitates their utilization" by the other aquifer State.

PART III

PROTECTION, PRESERVATION AND MANAGEMENT

Article 9

Protection and preservation of ecosystems

> Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in the aquifer or aquifer system, as well as that released in its discharge zones, are sufficient to protect and preserve such ecosystems.

Commentary

(1) Draft article 9 introduces Part III by laying down a general obligation to protect and preserve the ecosystems within a transboundary aquifer and also the outside ecosystems dependent on the aquifer by ensuring adequate quality and sufficient quantity of discharge water. Like article 192 of the United Nations Convention on the Law of the Sea and article 20 of the 1997 Watercourses Convention, draft article 9 contains obligations of both protection and preservation. These obligations relate to the "ecosystems" within and outside transboundary aquifers.

(2) The term "ecosystem" is explained in paragraph (4) of the commentary to draft article 5. "Ecosystem" refers generally to an ecological unit consisting of living and non-living components that are interdependent and function as a community. "In ecosystem, everything depends on everything else and nothing is really wasted."[507] An external impact affecting one component of an ecosystem may cause reactions among other components and may disturb the equilibrium of the entire ecosystem. Such an "external impact" or interference may impair or destroy the ability of an ecosystem to function as a life-support system. Human interferences may irreversibly disturb the equilibrium of freshwater ecosystems, in particular, rendering them incapable of supporting human and other forms of life. Interactions between freshwater ecosystems on the one hand and human activities on the other are becoming more complex and incompatible as socio-economic development proceeds. The obligation to protect and preserve the ecosystems within and outside transboundary aquifers addresses this problem, which is

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[507] "Ecosystem Approach to Water Management" (ENVWA/WP.3/R.7/Rev.1), p. 3, para. 9.

already acute in some parts of the world and which is likely to become so elsewhere. There are certain differences in the modalities of the protection and preservation of the ecosystem within aquifers and those of the protection and preservation of the outside ecosystems dependent on the aquifers. The quality and quantity of the discharge water exert great influence on the outside ecosystems.

(3) The obligation to "protect" the ecosystems requires the aquifer States to shield the ecosystems from harm or damage. The obligation to "preserve" the ecosystems applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition. It requires that these ecosystems be treated in such a way as to maintain, as much as possible, their natural state. Together, protection and preservation of aquatic ecosystems help to ensure their continued viability as life support systems.

(4) The obligation of States to take "all appropriate measures" is limited to the protection of relevant ecosystems. This allows States greater flexibility in the implementation of their responsibilities under this provision. It was, in particular, noted that there may be instances in which changing an ecosystem in some appreciable way may be justified by other considerations, including the planned usage of the aquifer in accordance with the draft articles.

(5) There are ample precedents for the obligation contained in draft article 9 in the practices of States and the works of international organizations. The ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) provides for the obligation of conservation of species and ecosystems and conservation of ecological processes.[508] The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) sets out the obligation to "ensure conservation and, where necessary, restoration of ecosystems". The Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London Protocol, 1999) provides for the obligation to "take all appropriate measures for the purpose of ensuring … effective protection of water resources used as sources of drinking water, and their related water ecosystems, from pollution from other causes,". The Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of

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[508] ASEAN Agreement on the Conservation of Nature and Natural Resources (1985).

Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002) provides that: "[T]he Parties shall, individually and, where appropriate, jointly, take all measures to protect and preserve the ecosystems of the Incomati and Maputo watercourses." The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligation to take all appropriate measures, individually or jointly and where appropriate with participation of all stakeholders to protect, conserve and where necessary rehabilitate the Basin and its ecosystems.

Article 10

Recharge and discharge zones

> 1. Aquifer States shall identify recharge and discharge zones of their transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the recharge and discharge processes.
>
> 2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system.

Commentary

(1) Groundwater experts explain the importance of the measures to be taken for the protection and preservation of recharge and discharge zones in order to ensure the proper functioning of an aquifer. Disrupting or blocking recharge or discharge processes by, for example, constructing a concrete barrier in these zones would seriously and adversely affect the aquifer. Recharge or discharge zones are outside the aquifer in accordance with the definition of "aquifer" in subparagraph (a) of draft article 2 and accordingly the separate draft article is required to regulate such zones. Paragraph 1 provides for the obligations of aquifer States with regard to the protection of recharge and discharge zones of their transboundary aquifers. There are two phases for implementing such obligations. The first is the obligation to identify the recharge or discharge zones of their transboundary aquifers and the second is to take special measures to protect such zones for the purposes of the sound functioning of the aquifers.

(2) As far as the identification of recharge and discharge zones are concerned, those zones must be hydraulically connected to the aquifer directly. Once the recharge and discharge zones are identified and as far as they are located in the territories of the aquifer States concerned, those States are under the obligation to take special measures to minimize detrimental impacts on

recharge and discharge processes. Such measures play a pivotal role for the protection and preservation of the aquifer. It is noted that it is vitally important to take all measures in recharge zones to prevent pollutants from entering the aquifer. However, the obligation to protect the recharge zone from polluting the aquifers is dealt with in the context of draft article 11, which deals specifically with pollution.

(3) Paragraph 2 deals with the case that recharge or discharge zones of a particular transboundary aquifer are located in a State other than the aquifer States that share the transboundary aquifer in question. Considering the importance of the recharge and discharge mechanism for the proper functioning of aquifers, it was decided to include an obligation on all States in whose territory a recharge or discharge zone is located to cooperate with aquifer States to protect the aquifer. It should be recalled, in this regard, that aquifer States are themselves covered by the general duty to cooperate in draft article 7.

Article 11

Prevention, reduction and control of pollution

> Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifer or aquifer system, including through the recharge process, that may cause significant harm to other aquifer States. In view of uncertainty about the nature and extent of transboundary aquifers or aquifer systems and of their vulnerability to pollution, aquifer States shall take a precautionary approach.

Commentary

(1) Draft article 11 sets forth the general obligation of aquifer States to prevent, reduce and control pollution of their transboundary aquifer that may cause significant harm to other aquifer States. The harm is that caused to other aquifer States through the transboundary aquifer and the aquifer related environment. The problem dealt with here is essentially the quality of water contained in the aquifer. This provision is a specific application of the general principles contained in draft articles 4 and 6.

(2) Some transboundary aquifers are already polluted to varying degrees, while others are not. In view of this state of affairs, draft article 11 employs the formula "prevent, reduce and control" in relation to the pollution. This expression is used in the 1982 United Nations Convention on the Law of the Sea in connection with marine pollution and in the 1997 Watercourses Convention. With respect to both the marine environment and international

watercourses, the situation is similar. The obligation to "prevent" relates to new pollution, while the obligations to "reduce" and "control" relate to existing pollution. As with the obligation to "protect" ecosystems under draft article 9, the obligation to "prevent … pollution … that may cause significant harm" includes the duty to exercise due diligence to prevent the threat of such harm. This obligation is signified by the words "may cause". The requirement that aquifer States "reduce and control" existing pollution reflects the practice of States. A requirement that existing pollution causing such harm be abated immediately could, in some cases, result in undue hardship, especially where the detriment to an aquifer State of origin was grossly disproportionate to the benefit that would accrue to an aquifer State experiencing the harm. On the other hand, failure of the aquifer State of origin to exercise due diligence in reducing the pollution to acceptable levels would entitle the affected State to claim that the State of origin had breached its obligation to do so. As stated in paragraph (2) of the commentary to draft article 10, a specific reference to the recharge process was added to this draft article.

(3) This draft article requires that the measures in question be taken "individually or jointly". The obligation to take joint action derives from certain general obligations contained in draft article 7, in particular, in its paragraph 2.

(4) The obligations of prevention, reduction and control all apply to pollution "that may cause significant harm to other aquifer States". Pollution below that threshold would not fall within the present article but, depending upon the circumstances, might be covered by draft article 9.

(5) The last sentence of the present article obligates aquifer States to take a precautionary approach in view of uncertainty about the nature and extent of some transboundary aquifers or aquifer systems and of their vulnerability to pollution. Groundwater experts emphasize how fragile a transboundary aquifer or aquifer system is. They also emphasize that once a transboundary aquifer or aquifer system is polluted, it is very difficult to remove the pollutant and that the pollution could be irreversible in many cases. Considering such fragilities and scientific uncertainties of a transboundary aquifer or aquifer system, a precautionary approach is required.

(6) Some members of the Commission strongly suggested that an independent draft article should be formulated on the basis of "precautionary principle". There are differing views

whether or not the "precautionary principle" has been established as customary international law. It is true that there are several regional treaties or conventions in which "precautionary principle" is expressly mentioned.[509] As far as universal treaties or conventions are concerned, different expressions such as "precautionary approach" and "precautionary measures" are used.[510] The majority of the members of the Commission considered that it would be better to avoid the conceptual and difficult discussions concerning the expression of "precautionary principle". A less disputed expression of "precautionary approach" could satisfy the basic necessity to introduce the special consideration of scientific uncertainties and vulnerability of aquifers. Of course, such a minimum requirement is residual and is without prejudice to the conventions with regard to a specific transboundary aquifer or aquifer system to be concluded by the aquifer States concerned to embody precautionary principle.

Article 12

Monitoring

> 1. Aquifer States shall monitor their transboundary aquifer or aquifer system. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with the competent international organizations. Where, however, monitoring activities are not carried out jointly, the aquifer States shall exchange the monitored data among themselves.

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[509] The Convention for the Protection of the Marine Environment of the North-East Atlantic (1992 OSPAR Convention), ILM, vol. 32 (1993), p. 1032, the Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992), United Nations, Law of the Sea Bulletin, No. 22 (1993), p. 54, the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, UNEP, Selected Multilateral Treaties … p. 448, as amended in 1995, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992), ILM, vol. 32 (1992), p. 1312, the Treaty Establishing the European Community and the Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention, 1991), ILM, vol. 30 (1991), p. 773, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London Protocol, 1999), UN document MP.WAT/2000/1, the Framework Convention on the Protection and Sustainable Development of the Carpathians (2003), UN document ECE/CEP 104, the Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994), O.J. L.342, 12.12.1997, p. 19, the Convention on the Protection of the Rhine (1999), O.J. L.289, 16.11.2000, p. 31, the Convention on the Sustainable Development of Lake Tanganyika (2003), FAOLEX (FAO legal database online) and the Convention on the Sustainable Development of Lake Victoria Basin (2003), FAOLEX (FAO legal database online).

[510] For example, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Protocol, 1996), ILM, vol. 36 (1997), p. 7, and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), United Nations, Treaty Series, vol. 2167, p. 3, use the expression of "precautionary approach". The United Nations Framework Convention on Climate Change (1992), ILM, vol. 31 (1992), p. 851, provides for the obligation to take "precautionary measures".

2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifer or aquifer system. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifer or aquifer system. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifer and aquifer system.

Commentary

(1) Most groundwater experts (scientists and administrators) emphasize that monitoring is indispensable for the proper management of a transboundary aquifer. In practice, monitoring is usually initiated individually by the State concerned, and also in many cases by local government, and develops later into a joint effort with the neighbouring States concerned. However, experts agree that ultimate and ideal monitoring is the joint monitoring based on the agreed conceptual model of the aquifer.

(2) Accordingly paragraph 1 sets out the obligation of aquifer States to monitor their transboundary aquifer. It requires aquifer States to monitor, wherever possible, jointly with other aquifer States concerned. It also recognizes the case where such joint monitoring has not been implemented and sets out the obligation of aquifer States to monitor individually and share the results of monitoring with other aquifer States concerned. The general obligation of international cooperation is provided in draft article 7. There are several stages in the obligation of international cooperation: regular exchange of data and information, monitoring, management, planned activities and so on. Draft article 12 elaborates one of such stages of the international cooperation.

(3) The importance of monitoring is widely recognized in many international instruments, for example, the Charter on Groundwater Management 1989[511] and the Guidelines on Monitoring and Assessment of Groundwaters 2000[512] both prepared by the Economic

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[511] It was adopted by ECE in 1989. See E/ECE/1197, ECE/ENVWA/12.

[512] They were drafted by the UN/ECE Task Force on Monitoring & Assessment under the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992) and were endorsed by the Parties to the Convention in March 2000.

Commission for Europe, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992 Helsinki Convention) and the African Convention on the Conservation of Nature and Natural Resources (2003 Maputo Convention).

(4) Draft article 12 is also related to draft article 8 on regular exchange of data and information. For the implementation of the obligation of regular exchange of data and information, effective monitoring is required. However, the data and information required by draft article 8 is limited to those concerning the condition of the aquifer. As stipulated in paragraph 2, monitoring needs to cover not only the conditions of the aquifer but also utilization of the aquifer such as withdrawal and artificial recharge of water.

(5) The purposes of monitoring are: (a) to clarify the conditions and utilization of a specific transboundary aquifer in order to take effective measures for its protection, preservation and management; and (b) to keep regular surveillance of it in order to acquire the information about any change or damage at an early stage. Effective monitoring through international cooperation will also contribute to further development of scientific knowledge about transboundary aquifers.

(6) There are various international instruments for the joint monitoring of a specific transboundary aquifer. An example is the Programme for the Development of a Regional Strategy for the Utilization of the Nubian Sandstone Aquifer System (NSAS) established in 2000. One of the agreements for the execution of this programme is the Terms of Reference for Monitoring and Data Sharing. The Framework Convention on the Protection and Sustainable Development of the Carpathians (2003) provides for the obligation to pursue the policies aiming at joint or complementary monitoring programmes, including the systematic monitoring of the state of the environment. The Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994) provides for not only an obligation to harmonize individual monitoring but also an obligation to elaborate and implement joint programmes for monitoring the riverine conditions in the Danube catchment area concerning water quality and quantity, sediments and riverine ecosystem. The EU Directive 2000/60/EC sets out that "Member States shall ensure the establishment of programmes for the monitoring of water status in order to establish a coherent and comprehensive overview of water status within each river basin district."

(7) As far as the aquifer States can agree to establish such a joint mechanism, it is the most effective approach. However, there are many cases where the aquifer States concerned have not yet initiated any consultation or have not yet reached any agreement to establish a joint mechanism. Even in such cases, they are, at least, under an obligation to conduct individual monitoring and share the result with the other aquifer States concerned. The African Convention on the Conservation of Nature and Natural Resources (2003) sets out the obligation of each Party to monitor the status of their natural resources as well as the impact of development activities and project upon such resources. The Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002) sets out the obligation of each Party to establish comparable monitoring systems, methods and procedures and implement a regular monitoring programme, including biological and chemical aspects for the Incomati and Maputo watercourses and report, at the intervals established by the Tripartite Permanent Technical Committee (TPTC), on the status and trends of the associated aquatic, marine and riparian ecosystems in relation to the water quality of the said watercourses. The Framework Agreement on the Sava River Basin (2002) provides for the obligation of the Parties to agree to establish a methodology of permanent monitoring of implementation of the Agreement and activities based upon it. The Convention on the Sustainable Development of Lake Tanganyika (2003) includes the obligation of monitoring in the provision for the prevention and control of pollution. The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligation of monitoring undertaken by individual State in a standardized and harmonized manner.

(8) Paragraph 2 provides the essential elements of the obligation of aquifer States to realize effective monitoring, i.e. the agreement or harmonization of the standard and the methodology for monitoring. Without such agreement or harmonization, collected data would not be useful. Before a State can use data collected by other States, it must first understand when, where, what, why and how such data was collected. With these "metadata" (data about data), the State can independently assess the quality of those datasets and, if they meet their minimum data standards, the State can proceed with harmonizing available data and interpreting the consolidated database. In the case of the Franco-Swiss Commission on the Genevese Aquifer, the two sides started with each others data standard and, with time and practice, reached the level of harmonized data which are comparable. The aquifer States should also agree on the

conceptual model of the specific aquifer in order to be able to select key parameters which they will monitor. There are two kinds of conceptual models. One is the physical matrix and the other is the hydro-dynamic model. The aquifer States can agree on a model at the beginning and then change it as they gain better knowledge of the aquifer as a result of monitoring. Key parameters to be monitored include the condition of the aquifer and the utilization of the aquifer as noted in paragraph (4) of the present commentary. The data on the condition of the aquifer relate to extent, geometry, flow path, hydrostatic pressure distribution, quantities of flow, hydrochemistry, etc. and are equivalent to those fields listed in paragraph 1 of draft article 8.

(9) While the general obligations are couched in mandatory language, the modalities for achieving compliance with the main obligations remain recommendatory, in order to facilitate compliance by States. It is also noted that aquifers to be monitored are ones that are being utilized.

Article 13

Management

> Aquifer States shall establish and implement plans for the proper management of their transboundary aquifer or aquifer system in accordance with the provisions of the present draft articles. They shall, at the request by any of them, enter into consultations concerning the management of the transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

Commentary

(1) Draft article 13 sets out the obligation of the aquifer States to establish and implement plans for the proper management of their transboundary aquifer. In view of the sovereignty over the aquifer located in the State's territory and the need for cooperation among aquifer States, two kinds of obligations are introduced in the present draft article: first, the obligation of each aquifer State to establish its own plan with regard to its aquifer and to implement it and second, the obligation to enter into consultation with other aquifer States concerned at the request of any of the latter States.

(2) Paragraph 2 of article 24 of the 1997 Watercourses Convention provides that "'management' refers, in particular, to: (a) planning of the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and (b) otherwise promoting the rational and optimal utilization, protection and control of the

watercourse". Exactly the same definition is accepted in the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000). This protocol entered into force in 2003. Such a definition can be used in the present subject *mutatis mutandis*.

(3) The rules in relation to the management of transboundary aquifers are provided in Part II. The obligations to utilize them in an equitable and reasonable manner, not to cause harm to other States and to cooperate with other aquifer States are the basis of the proper management of transboundary aquifers. The term "management" encompasses the measures to be taken for the maximization of the long-term benefits derived from the utilization of aquifers. It also includes the protection and preservation of transboundary aquifers.

(4) The first sentence of this draft article states an obligation for each aquifer State to establish plans with regard to its aquifer and to implement them for the proper management, taking into due consideration the rights of the other aquifer States concerned. The second sentence requires that State to enter into consultations concerning the management of the transboundary aquifer, if any other aquifer State should so request. The last sentence mandates that a joint management mechanism be established wherever appropriate. The Commission felt that the strengthening of this obligation was particularly important in the light of the value placed by groundwater experts on the joint management of transboundary aquifers. It was also recognized that, in practice, it may not always be possible to establish such a mechanism. The outcome of the consultations is left in the hands of the States concerned. States have established numerous joint commissions, many of which are charged with management. In particular, the modes of cooperation with regard to a specific transboundary aquifer are undertaken in less formal means, such as by holding regular meetings between the appropriate agencies or the representatives of the States concerned. Most of the transboundary aquifers in Europe are rather small and are managed often on trans-frontier level or by local municipalities. Such cooperation between local authorities should be encouraged. Thus the present draft article refers to a joint management "mechanism" rather than an organization in order to provide for such less formal means of joint management.

(5) The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides for the obligation of the management of the water resources "so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs". The Protocol to this Convention

(London Protocol, 1999) further clarifies the elements to be considered for the purpose of water management. The Convention on the Protection and Sustainable Development of the Carpathians (2003) sets out the obligation of "river basin management". The African Convention on the Conservation of Nature and Natural Resources (2003) provides for the obligation to "manage their water resources so as to maintain them at the highest possible quantitative and qualitative levels".

(6) There are some examples in which a regional institution or mechanism is established for the purpose of the management of a specific transboundary aquifer. The Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000) "seeks to promote and facilitate the establishment of shared watercourse agreements and Shared Watercourse Institutions for the management of shared watercourses". The Framework Agreement on the Sava River Basin (2002) provides for the obligation to "cooperate to achieve the establishment of sustainable water management". It also sets out the obligation "to develop joint and/or integrated plan on the management of the water resources of the Sava River Basin ...". The Convention on the Sustainable Development of Lake Tanganyika (2003) sets out the obligation of the management of the natural resources of Lake Tanganyika and establishes the Lake Tanganyika Authority. One of the functions of this Authority is to advance and represent the common interest of the Contracting States in matters concerning the management of Lake Tanganyika and its Basin. The Protocol for Sustainable Development of Lake Victoria Basin (2003) provides for the obligations of Parties and the Commission established by this protocol with regard to the management plans for the conservation and the sustainable utilization of the resources of the Basin.

PART IV

ACTIVITIES AFFECTING OTHER STATES

Article 14

Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. **Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.**

3. **If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body to make an impartial assessment of the effect of the planned activities.**

Commentary

(1) The 1997 Watercourses Convention has nine articles on planned measures which may have a significant adverse effect upon other watercourse States. They set out detailed procedures to be followed by the States concerned. In the case of international watercourses, there have been a number of large development projects and related disputes among the States concerned and detailed procedures to avoid disputes and mitigate such disputes were required. In the case of transboundary aquifers, detailed procedures for dealing with planned activities have not yet been developed and it seems to be the general preference to have simpler procedural requirements which could be provided only in one draft article. Draft article 14 has a broader scope in that it applies to any State that has reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby cause a significant adverse effect on another State whether it be an aquifer State or not. Thus, the provision does not apply only to aquifer States.

(2) The activities to be regulated in this draft article could be carried out either by States, their subsidiary organs or by private enterprises. In order to fulfil the obligations under this draft article in Part IV on Activities affecting Other States. States must know in advance all the planning of such activities and therefore must establish the domestic legal regime which requires the authorization by the States of such activities.

(3) Paragraph 1 sets out the minimum obligation of a State to undertake prior assessment of the potential effect of the planned activity. Planned activities include not only utilization of transboundary aquifers but also other activities that have or are likely to have an impact upon those aquifers. Such an obligation should be distinguished from the general obligations in

Part III concerning Protection, Preservation and Management in the sense that it is closely related to the planning of activities. In addition to the measures to be taken under Part III, an aquifer State is under the obligation to undertake assessment on any adverse effects of planned activity on the transboundary aquifers. This obligation is a minimum requirement in two senses. First, a State is required to assess the potential effects of the planned activity only when it has reasonable grounds for anticipating the probability of adverse effects. Second, the State is not under this obligation if the assessment is not practicable.

(4) The obligation of the assessment by a State that is planning a particular activity is provided in a wide variety of treaties and conventions. For example, the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) sets forth the obligation to "endeavour to make environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment or the natural resources of another Contracting Party or the environment or natural resources beyond national jurisdiction". The African Convention on the Conservation of Nature and Natural Resources (2003) provides for the obligation "to ensure that policies, plans, programmes, strategies, projects and activities likely to affect natural resources, ecosystems and the environment in general are the subject of adequate impact assessment at the earliest possible stage". The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (1998) provides that "The Parties shall adopt the necessary provisions to ensure that projects and activities covered by this Agreement which, owing to their nature, size and location, must be subjected to trans-border impact assessment are so assessed before they are approved."

(5) The importance of the environmental impact assessment is also indicated in the instruments prepared by the United Nations. For example, the Charter on Groundwater Management (1989) prepared by the United Nations Economic Commission for Europe provides that "All projects in any economic sector expected to affect aquifers adversely should be subject to an assessment procedure aiming at evaluating the project's possible impact on the water regime and/or the quality of groundwater resources, with particular attention to the important role groundwater plays in the ecological system." Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development,

Management and Use of Water Resources (1992) of the Agenda 21 suggests that all States could implement "Mandatory environmental impact assessment of all major water resource development projects potentially impairing water quality and aquatic ecosystems."

(6) The results from the assessment contribute to the sound planning of the activity. They also constitute the basis for the further procedures in paragraphs 2 and 3. Those paragraphs establish a procedural framework designed to avoid disputes relating to planned activities. When the assessment of the potential effects of a planned activity conducted in accordance with paragraph 1 indicates that such activity would cause adverse effect on the transboundary aquifers and that it may have a significant adverse effect on other States, the original State is obliged under paragraph 2 to notify the States concerned of its finding. Such notification is to be accompanied by available technical data and information, including environmental impact assessment, and is to provide the would-be affected States with the necessary information to make their own evaluation of the possible effects of the planned activity.

(7) If the notified States are satisfied with the information and the assessment provided by the notifying States, they have the common ground to deal with the planned activity. On the other hand, if they disagree on the assessment of the effects of the planned activity, they have an obligation to endeavour to arrive at an equitable resolution of the situation in accordance with paragraph 3. The precondition to such resolution would be for the States concerned to have a common understanding of the possible effects. To that end, an independent fact-finding mechanism would play an important role in providing scientific and impartial assessment of the effect of the planned activity. Article 33 of the 1997 Watercourses Convention provides for a compulsory recourse to such fact-finding. It seems that there exists no evidence as yet for such an obligation in relation to groundwaters. Accordingly, an optional reference to such a fact-finding mechanism is adopted.

(8) The procedure provided for in this draft article is triggered by the criterion that the planned activity may have "a significant adverse effect" upon other States. This threshold is lower than that of "significant harm" under draft article 6.

PART V

MISCELLANEOUS PROVISIONS

Article 15

Scientific and technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, technical and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems. Such cooperation shall include, *inter alia*:

(*a*) Training of their scientific and technical personnel;

(*b*) Facilitating their participation in relevant international programmes;

(*c*) Supplying them with necessary equipment and facilities;

(*d*) Enhancing their capacity to manufacture such equipment;

(*e*) Providing advice on and developing facilities for research, monitoring, educational and other programmes;

(*f*) Providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting transboundary aquifers or aquifer systems;

(*g*) Preparing environmental impact assessments.

Commentary

(1) Draft article 15 deals with the scientific and technical cooperation to developing States. It should be highlighted that the term "cooperation" was preferred to the term "assistance" in this draft article. The term "cooperation" better represents the two-sided process necessary to foster sustainable growth in developing States. Under the first sentence of this provision, States are required to promote scientific, technical and other cooperation. The types of cooperation listed in the second sentence represent some of the various options available to States to fulfil the obligation set forth in the first sentence. States will not be required to engage in each of the types of cooperation listed, but will be allowed to choose their means of cooperation.

(2) The science of groundwaters, hydrogeology, is rapidly developing. Such new and rapidly developing scientific knowledge is mainly owned by developed States and is not yet fully shared by many developing States. Scientific and technical cooperation with developing States has

been provided through the competent international organizations. UNESCO-IHP plays a central role in this field and is the global intergovernmental scientific programme of the United Nations system which can respond to specific national and regional needs and demands. The regional arrangements are also developing successfully due to wide ranges of assistance rendered by the competent international organizations. It would be appropriate to provide for the obligation of individual States to promoting scientific and technical cooperation.

(3) The obligation under this draft article is one of the modalities of cooperation among States and its roots are to be found in article 202 (Scientific and technical assistance to developing States) of the 1982 United Nations Convention on the Law of the Sea. The Stockholm Declaration of the United Nations Conference on the Human Environment (1972) indicates the importance of technological assistance as a supplement to the domestic effort of the development and the special consideration of developing States for the purpose of development and environmental protection (Principles 9 and 12). The Rio Declaration on Environment and Development suggests the common but differentiated responsibilities in Principle 7. Principle 9 of this Declaration mentions that "States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies."

(4) The cooperation under this draft article mainly focuses on scientific, educational and technical cooperation. The expression, "other cooperation" covers other possible modes of cooperation, for example, procedural or legal assistance to establish appropriate programmes or systems. This list follows the one provided in article 202 of the UNCLOS. It would be appropriate to put the emphasis upon the cooperation for the education and training of the scientific and technical personnel and for the capacity-building of developing States concerning the measures for protection, monitoring or impact assessment. Such cooperation will contribute to the development of mutual cooperation among developing States in the future. The list is not exhaustive.

(5) The elements of cooperation stipulated in this draft article are also mentioned in several conventions and treaties. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides for the obligation of mutual assistance. The Protocol on Water and Health to the 1992 Convention on the Protection

and Use of Transboundary Watercourses and International Lakes (London Protocol, 1999) emphasizes the importance of the "education and training of the professional and technical staff who are needed for managing water resources and for operating systems of water supply and sanitation" and of the "updating and improvement of their knowledge and skills". This protocol enumerates the aspects in which international support for national action is required as follows: (a) preparation of water-management plans in transboundary, national and/or local contexts and of schemes for improving water supply and sanitation; (b) improved formulation of projects, especially infrastructure projects, in pursuance of such plans and schemes, in order to facilitate access to sources of finance; (c) effective execution of such projects; (d) establishment of systems for surveillance and early-warning systems, contingency plans and response capacities in relation to water-related disease; (e) preparation of legislation needed to support the implementation of this Protocol; (f) education and training of key professional and technical staff; (g) research into, and development of, cost-effective means and techniques for preventing, controlling and reducing water-related disease; (h) operation of effective networks to monitor and assess the provision and quality of water-related services, and development of integrated information systems and databases; (i) achievement of quality assurance for monitoring activities, including inter-laboratory comparability. It is also noted that the United Nations Convention to Combat Desertification (1994) provides a specific article regarding the obligations of developed country Parties in article 6. It enumerates such obligations and one of them is to "promote and facilitate access by affected country Parties, particularly affected developing country Parties, to appropriate technology, knowledge and know-how".

(6) The obligation of mutual cooperation is also provided in regional conventions. One of the examples is the African Convention on the Conservation of Nature and Natural Resources (2003), which sets out the obligation to "encourage and strengthen cooperation for the development and use, as well as access to and transfer of, environmentally sound technologies on mutually agreed terms", and, to this effect, to "adopt legislative and regulatory measures which provide for, *inter alia*, economic incentives for the development importation, transfer and utilization of environmentally sound technologies in the private and public sectors".

(7) The importance of the scientific and technical assistance is also mentioned in other non-binding declarations. The Mar del Plata Action Plan adopted in the United Nations Water Conference in 1977 points out the lack of sufficient scientific knowledge about water resources.

With regard to groundwater, it recommends that the countries should "(i) Offer assistance for the establishment or strengthening of observational networks for recording quantitative and qualitative characteristics of ground-water resources; (ii) Offer assistance for the establishment of ground-water data banks and for reviewing the studies, locating gaps and formulating programmes of future investigations and prospection; (iii) Offer help, including personnel and equipment, to make available the use of advanced techniques, such as geophysical methods, nuclear techniques, mathematical models etc".[513]

(8) Chapter 18 of Agenda 21 adopted in the United Nations Conference on Environment and Development (1992) points out that one of the four principal objectives to be pursued is "to identify and strengthen or develop, as required, in particular in developing countries, the appropriate institutional, legal and financial mechanisms to ensure that water policy and its implementation are a catalyst for sustainable social progress and economic growth".[514] And it suggests that "All States, according to their capacity and available resources, and through bilateral or multilateral cooperation, including the United Nations and other relevant organizations as appropriate, could implement the following activities to improve integrated water resources management: …". Development and strengthening, as appropriate, of cooperation, including mechanisms where appropriate, at all levels concerned, namely: … (iv) At the global level, improved delineation of responsibilities, division of labour and coordination of international organizations and programmes, including facilitating discussions and sharing of experiences in areas related to water resources management".[515] It also points out that one of the three objectives to be pursued concurrently to integrate water-quality elements into water resource management is "human resources development, a key to capacity-building and a prerequisite for implementing water-quality management".[516] The Plan of Implementation of the World Summit on Sustainable Development (2002) also mentions technical assistance.[517]

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[513] The Mal del Plata Action Plan, 4, (b).

[514] Agenda 21, 18.9 (d).

[515] Agenda 21, 18.12.

[516] Agenda 21, 18.38 (c).

[517] The Plan of Implementation of the World Summit on Sustainable Development (2002), IV, 25.

Article 16

Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that poses an imminent threat of causing serious harm to aquifer States or other States.

2. Where an emergency affects a transboundary aquifer or aquifer system and thereby poses an imminent threat to States, the following shall apply:

(*a*) The State within whose territory the emergency originates shall:

(i) without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(ii) in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency;

(*b*) States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available trained emergency response personnel, emergency response equipments and supplies, scientific and technical expertise and humanitarian assistance.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

Commentary

(1) Draft article 16 deals with the obligations of States in responding to actual emergency situations that are related to transboundary aquifers. It is to be contrasted with draft article 11 which deals with the prevention and mitigation of conditions that may be harmful to aquifer States. The 1997 Watercourses Convention contains a similar provision in article 28. In the case of aquifers, emergencies might not be as numerous and destructive as in the case of watercourses. However, it would be desirable to insert an article on this issue in view of the devastating tsunami disaster along the coast of the Indian Ocean, which resulted from a great earthquake that occurred off Banda Aceh, Indonesia, in December 2004. Although no definite

studies have yet been published, a great number of aquifers must have been negatively affected. Owing to the destruction of the discharge processes, salinization of aquifers might have occurred. In consultation with groundwater experts, this draft article was prepared to cope with such situations.

(2) Paragraph 1 gives the definition of "emergency". The commentary to paragraph 1 of article 28 of the 1997 Watercourses Convention explains that the definition of "emergency" contains a number of important elements, and includes several examples that are provided for purposes of illustration. As defined, an "emergency" must cause, or pose an imminent threat of causing, "serious harm" to other States. The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the draft article. The expression "other States" refers to both aquifer and non-aquifer States that might be affected by an emergency. These would usually be the States in whose territories either aquifers or the recharge or discharge zones are located. The situation constituting an emergency must arise "suddenly". However, the provision covers the case where the "emergency" can be expected by weather forecast.

(3) As the emergency situation would pose "an imminent threat of causing serious harm", the State in whose territory the emergency originates is obligated under paragraph 2, subparagraph (a) (i) to notify, "without delay and by the most expeditious means available", other potentially affected States and competent international organizations of the emergency. A similar obligation is contained, for example, in the 1986 Convention on Early Notification of a Nuclear Accident, the 1982 United Nations Convention on the Law of the Sea and a number of agreements concerning transboundary aquifers. "Without delay" means immediately upon learning of the emergency, and the phrase "by the most expeditious means available" means that the most rapid means of communication that is accessible is to be utilized. The States to be notified are not confined to aquifer States since non-aquifer States may also be affected by an emergency. The subparagraph also calls for the notification of "competent international organizations". Such an organization would have to be competent to participate in responding to the emergency by virtue of its constituent instrument. Most frequently, such an organization would be one established by the aquifer States to deal, *inter alia*, with emergencies. Finally, the situation may result either "from natural causes … or from human conduct". While there may

well be no liability on the part of a State for the harmful effects in another State of an emergency originating in the former and resulting entirely from natural causes, the obligations under paragraph 2, subparagraphs (a) and (b) would nonetheless apply to such an emergency.

(4) Paragraph 2, subparagraph (a) (ii) requires that a State within whose territory an emergency originated "immediately take all practicable measures … to prevent, mitigate and eliminate any harmful effects of the emergency". The effective action to counteract most emergencies resulting from human conduct is that to be taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are feasible, workable and reasonable. Further, only such measures as are "necessitated by the circumstances" need to be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Like paragraph 2, subparagraph (a) (i), paragraph 2, subparagraph (a) (ii) foresees the possibility that there will be a competent international organization, such as a joint commission, with which the States may cooperate in taking the requisite measures. And finally, cooperation with potentially affected States (again including non-aquifer States) is also provided for. Such cooperation may be especially appropriate in the case of contiguous aquifers or aquifer systems or where a potentially affected State is in a position to render cooperation in the territory of the aquifer State where the emergency originated.

(5) The obligation of immediate notification to other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States is suggested in Principle 18 of the Rio Declaration on Environment and Development (1992). Several regional conventions provide for the obligation of notification without delay to the potentially affected States, regional commission or agency and other competent organizations. They are, for example, the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (2000), the Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for Co-operation on the Protection and Sustainable Utilization of the Water Resources of the Incomati and Maputo Watercourses (2002), the Convention on the Sustainable Development of Lake Tanganyika (2003) and the Protocol for Sustainable Development of Lake Victoria Basin (2003). The African Convention on the Conservation of Nature and Natural Resources (2003)

sets out the right of the State Party to be provided with all relevant available data by the other Party in whose territory environmental emergency or natural disaster occurs and is likely to affect the natural resources of the former State.

(6) Some of the conventions have established mechanisms or systems for the early notification of emergency situations. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention, 1992) provides that "The Riparian Parties shall without delay inform each other about any critical situation that may have transboundary impact" and provides for the obligation to set up, where appropriate, and to operate coordinated or joint communication, warning and alarm systems. The Convention on Cooperation for the Protection and Sustainable Use of the River Danube (1994) establishes a "coordinated or joint communication, warning and alarm systems" and provides for the obligation to consult on ways and means of harmonizing domestic communication, warning and alarm systems and emergency plans. The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins (1998) provides for the obligation of the Parties of establishment or improvement of joint or coordinated communication systems to transmit early warning or emergency information.

(7) Paragraph 2, subparagraph (b) sets out the obligation of assistance by all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency. Groundwater scientists and administrators are unanimous in recognizing the need for joint efforts by all the States to cope effectively with an emergency. Assistance required would relate to coordination of emergency actions and communication, providing trained emergency response personnel, response equipments and supplies, extending scientific and technical expertise and humanitarian assistance.

(8) UNESCO-IHP has the project "Groundwater for Emergency Situations" (GWES). The aim of the project is to consider natural and man-induced catastrophic events that could adversely influence human health and life and to identify in advance potential safe, low vulnerability groundwater resources which could temporarily replace damaged supply systems. Secure drinking water for endangered populations is one of the highest priorities during and immediately after disasters.

(9) Paragraph 3 provides for the exceptions to the obligations under draft articles 4 and 6 in an emergency. Aquifer States may temporarily derogate from the obligations under those draft articles where water is critical for the population to alleviate an emergency situation. Although the 1997 Watercourses Convention does not contain such a clause in the case of aquifers special account should be taken in an emergency situation of vital human needs. For example, in the case of natural disasters, such as earthquakes or floods, an aquifer State must immediately satisfy the need of their population for drinking water. In the case of watercourses, the States could meet such requirement without derogation from the obligations as the recharge of the water to the watercourses would be likely to be sufficient. However, in the case of the aquifers, the States concerned would not be able to do so as there would be no recharge or little recharge. Accordingly, the States must be entitled to exploit the aquifer temporarily without fulfilling the obligations under draft articles 4 and 6. However, the present article deals only with the temporary derogation. There might be cases where the States would not be able to fulfil the obligations in other draft articles also in an emergency. In such a case, the States could invoke such circumstances precluding wrongfulness in general international law such as *force majeure*, distress or necessity.

Article 17

Protection in time of armed conflict

> Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.

Commentary

(1) Draft article 17 concerns the protection to be accorded to transboundary aquifers and related installations in time of armed conflict. The 1997 Watercourses Convention contains an article regarding the same subject and the basic idea of the present article is the same. This draft article, which is without prejudice to existing law, does not lay down any new rule. It simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning water resources and related works. These provisions fall generally into two categories: those concerning the protection of water resources and related works; and those dealing with the utilization of such water resources

and works. Since detailed regulation of this subject matter would be beyond the scope of a framework instrument, draft article 17 does no more than to refer to each of these categories of principles and rules.

(2) Draft article 17 is not addressed only to aquifer States, in view of the fact that transboundary aquifers and related works may be utilized or attacked in time of armed conflict by non-aquifer States as well. The draft article's principal function is to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.

(3) The obligation of the aquifer States to protect and utilize transboundary aquifers and related works in accordance with the present draft articles should remain in effect even during the time of armed conflict. Warfare may, however, affect transboundary aquifers as well as the protection and utilization thereof by aquifer States. In such cases, draft article 17 makes it clear that the rules and principles governing armed conflict apply, including various provisions of conventions on international humanitarian law to the extent that the States in question are bound by them. For example, the poisoning of water supplies is prohibited by the Hague Convention of 1907 Concerning the Laws and Customs of Land Warfare and article 54 of Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, while article 56 of that Protocol protects dams, dikes and other works from attacks that "may cause the release of dangerous forces and consequent severe losses among the civilian population". Similar protections apply in non-international armed conflicts under articles 14 and 15 of Protocol II Additional to the 1949 Geneva Conventions. Also relevant to the protection of water resources in time of armed conflict is the provision of Protocol I that "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage." In cases not covered by a specific rule, certain fundamental protections are afforded by the "Martens clause". That clause, which was originally inserted in the Preamble of the Hague Conventions of 1899 and 1907 and has subsequently been included in a number of conventions and protocols, now has the status of general international law. In essence, it provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. Paragraph 2 of draft article 5 of the present draft articles, provides that in reconciling a conflict between utilizations of transboundary aquifers special attention is to be paid to the requirement of vital human needs.

Article 18

Data and information concerning national defence or security

Nothing in the present draft articles obliges a State to provide data or information the confidentiality of which is essential to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft article 18 creates a very narrow exception to the requirement of draft articles requiring provision of information. The same rule is provided in the 1997 Watercourses Convention. States cannot be realistically expected to agree to the release of information that is vital to their national defence or security. At the same time, however, an aquifer State that may experience adverse effects of planned measures should not be left entirely without information concerning those possible effects. Draft article 18 therefore requires the State withholding information to "cooperate in good faith with the other States with a view to providing as much information as possible under the circumstances". The "circumstances" referred to are those that led to the withholding of the data or information. The obligation to provide "as much information as possible" could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the aquifer or affect other States. The draft article is thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other. As always, the exception created by draft article 18 is without prejudice to the obligations of the planning State under draft articles 4 and 6.

(2) The inclusion of this draft article was one of the most contentious issues discussed in the Commission. Some members were of the view that such a provision could lend itself to abuse and had difficulty imagining a situation where national security issues should take precedence over the other provisions of the draft articles. They were of the view that such an article should not be included. It was also stressed that article 31 of the 1997 Watercourses Convention limited the discretion of the State for exemption to a much higher extent. It requires the data and information to be vital (and not essential) to its national defence and security. Other members expressed the view that such protection was of utmost importance to States and would be called

for by the Sixth Committee. They argued that, in many circumstances, the draft articles required States to share more information than was strictly necessary for the protection of the aquifer and aquifer system. Moreover, they were of the view that the protection of information vital to national security would not unduly interfere with the functioning of the other provisions of the draft articles.

(3) It is also noted that a suggestion was made to add the protection of industrial secrets and intellectual property to the text of the draft article, in line with article 14 of the draft articles on Prevention of Transboundary Harm from Hazardous Activities. However, some members considered it was unclear whether such a protection was necessary or helpful in the case of transboundary aquifers and expressed concern that such an exemption might be too broad in the groundwater context. In any event the existence of intellectual property could be one of the factors to be considered in determining what data is readily available under draft article 8.

Article 19

Bilateral and regional agreements and arrangements

> For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into a bilateral or regional agreements or arrangement among themselves. Such agreement or arrangement may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as the agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

Commentary

(1) The importance of bilateral or regional agreements and arrangements that take due account of the historical, political, social and economic characteristics of the region and of the specific transboundary aquifer must be stressed. The first sentence calls upon the aquifer States to cooperate among themselves and encourages them to enter into bilateral or regional agreements or arrangements for the purpose of managing the particular transboundary aquifer. The concept of reserving the matter to the group of aquifer States concerned with the particular aquifer is based on the principles that are set forth in the United Nations Convention on the Law

of the Sea.[518] It also corresponds to the "watercourse agreements" provided for in article 3 of the 1997 Watercourses Convention. In the case of surface watercourses, numerous bilateral and regional agreements have been concluded. However, in the case of groundwaters, such international collective measures are still in an embryonic stage and the framework for cooperation remains to be properly developed. Therefore, the term "arrangement" has been added in this paragraph. This paragraph also provides that the States concerned should have equal opportunity to participate in such agreements or arrangements.

(2) Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization. When an agreement or arrangement is for the entire aquifer or aquifer system, all the aquifer States sharing the same aquifer or aquifer system are most likely to be involved except for some rare cases. On the other hand, when an agreement or arrangement is for any part of the aquifer or aquifer system or for a particular project, only a few of the aquifer States sharing the same aquifer would be involved. In any event, the second sentence obligates the aquifer States not to enter into an agreement or arrangement which would adversely affect the position of the excluded aquifer States without their express consent. It does not mean to give a veto power to those other States.

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[518] UNCLOS, article 118 (Cooperation of States in the Conservation and Management of Living Resources of the High Seas) and article 197 (Cooperation on Global or Regional Basis).

CHAPTER VII

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

77. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[519] The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

78. At its fifty-fourth session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[520] At the same session, the Commission established a Working Group on the topic. The Working Group in its report[521] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[522]

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[519] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

[520] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 461-463.

[521] *Ibid.*, paras. 465-488.

[522] *Ibid.*, para. 464.

79. From its fifty-fifth (2003) to its fifty seventh (2005) sessions, the Commission had received and considered three reports from the Special Rapporteur,[523] and provisionally adopted draft articles 1 to 16 [15].[524]

B. Consideration of the topic at the present session

80. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/564 and Add.1 and 2), as well as written comments received so far from international organizations and from governments.[525]

81. The fourth report of the Special Rapporteur, like the previous reports, followed the general pattern of the articles on Responsibility of States for internationally wrongful acts.

82. The fourth report contained 13 draft articles. Eight draft articles corresponded to those contained in Chapter V of the articles on Responsibility of States for internationally wrongful acts, under the heading "Circumstances precluding wrongfulness". Five draft articles dealt with the responsibility of a State in connection with the wrongful act of an international organization.

83. The Special Rapporteur presented the eight draft articles relating to circumstances precluding wrongfulness, namely, draft articles 17 to 24: article 17

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[523] A/CN.4/532 (first report), A/CN.4/541 (second report) and A/CN.4/553 (third report).

[524] Draft articles 1 to 3 were adopted at the fifty-fifth session (2003), draft articles 4 to 7 at the fifty-sixth session (2004) and draft articles 8 to 16 [15] at the fifty-seventh session (2005).

[525] Following the recommendations of the Commission (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, (A/57/10 and Corr.1), paras. 464 and 488 and *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.), the Secretariat, on annual basis, has been circulating the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see A/CN.4/545, A/CN.4/547, A/CN.4/556 and A/CN.4/568 and Add.1.

"Consent",[526] article 18 "Self-defence",[527] article 19 "Countermeasures",[528] article 20 "*Force majeure*",[529] article 21 "Distress",[530] article 22 "Necessity",[531] article 23 "Compliance with peremptory norms",[532] and article 24 "Consequences of invoking a circumstance precluding wrongfulness".[533]

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[526] Draft article 17 reads as follows:

Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

[527] Draft article 18 reads as follows:

Self-defence

The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

[528] Draft article 19 reads as follows:

Countermeasures

Alternative A

[...]

Alternative B

The wrongfulness of an act of an international organization not in conformity with an international obligation towards another international organization [or a State] is precluded if and to the extent that the act constitutes a lawful countermeasure taken against the latter organization [or the State].

[529] Draft article 20 reads as follows:

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

[530] Draft article 21 reads as follows:

Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

[531] Draft article 22 reads as follows:

84. Draft articles 17 to 24 are closely modelled on the corresponding articles on Responsibility of States for internationally wrongful acts, namely, articles 20 to 27. In the view of the Special Rapporteur, the principles contained in the chapter on "Circumstances precluding wrongfulness" were equally applicable to international organizations, although in some cases they needed to be adjusted to fit the particular nature of international organizations. Although the available practice with regard to circumstances precluding wrongfulness was limited, clear parallels could be drawn between States and international organizations in this regard. Thus, there was no reason for departing from the general approach taken in the context of States. However, this did not signify that the provisions would apply the same way in the case of international organizations.

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(*a*) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest that the organization has the function to protect; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The organization has contributed to the situation of necessity.

[532] Draft article 23 reads as follows:

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

[533] Draft article 24 reads as follows:

Article 24

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

85. The Special Rapporteur also presented draft articles relating to the responsibility of a State in connection with the wrongful act of an international organization namely draft articles 25 to 29: article 25 "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization",[534] article 26 "Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization",[535] article 27 "Coercion of an international organization by a State",[536] article 28 "Use by a State that is a member of an international organization of the separate personality of

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[534] Draft article 25 reads as follows:

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

[535] Draft article 26 reads as follows:

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

[536] Draft article 27 reads as follows:

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

that organization",[537] and article 29 "Responsibility of a State that is a member of an international organization for the internationally wrongful act of that organization".[538]

86. In presenting these articles, the Special Rapporteur stated that Chapter IV of Part One of the articles on Responsibility of States for internationally wrongful acts deals with aid or assistance, direction or control and coercion by one State in the commission of the wrongful act by another State. That chapter does not address the question of such relationships between a State and an international organization. Draft articles 25 to 27 cover that gap and they largely correspond to articles 16 to 18 of Responsibility of States for internationally wrongful acts. Draft articles 28 and 29 are unique to this topic and have no equivalent in the articles of State responsibility.

87. The Commission considered the fourth report of the Special Rapporteur at its 2876th to 2879th and 2891st to 2895th meetings, from 16 to 19 May and from 11 to 14 and 18 July 2006 respectively. At its 2879th meeting, on 19 May 2006, and its 2895th meeting, on 18 July 2006, the Commission referred draft articles 17 to 24 and 25 to 29 to the Drafting Committee.

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[537] Draft article 28 reads as follows:

Use by a State that is a member of an international organization of the separate personality of that organization

1. A State that is a member of an international organization incurs international responsibility if:

(*a*) It avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and

(*b*) The organization commits an act that, if taken by that State, would have implied non-compliance with that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

[538] Draft article 29 reads as follows:

Responsibility of a State that is a member of an international organization for the internationally wrongful act of that organization

Except as provided in the preceding articles of this chapter, a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless:

(*a*) It has accepted with regard to the injured third party that it could be held responsible; or

(*b*) It has led the injured third party to rely on its responsibility.

88. The Commission considered and adopted the report of the Drafting Committee on draft articles 17 to 24 at its 2884th meeting, on 8 June 2006, and draft articles 25 to 30 at its 2902nd meeting on 28 July 2006 (section C.1 below).

89. At its 2910th meetings on 8 August 2006, the Commission adopted the commentaries to the aforementioned draft articles (section C.2 below).

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of the draft articles

90. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INTRODUCTION

Article 1[539]

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

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[539] For the commentary to this article, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 34-37.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Article 2[540]

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3[541]

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.

CHAPTER II[542]

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 4[543]

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

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[540] For the commentary, see *ibid.*, pp. 38-45.

[541] For the commentary, see *ibid.*, pp. 45-49.

[542] For the commentary to this chapter, see *ibid.*, *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 100-103.

[543] For the commentary to this article, see *ibid.*, pp. 104-109.

2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.[544]

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.

4. For the purpose of the present draft article, "rules of the organization" means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.[545]

Article 5[546]

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 6[547]

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 7[548]

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

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[544] The location of paragraph 2 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[545] The location of paragraph 4 may be reconsidered at a later stage with a view to eventually placing all definitions of terms in article 2.

[546] For the commentary to this article, see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 110-115.

[547] For the commentary, see *ibid.*, pp. 116-120.

[548] For the commentary, see *ibid.*, pp. 120-122.

CHAPTER III[549]

BREACH OF AN INTERNATIONAL OBLIGATION

Article 8[550]

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 also applies to the breach of an obligation under international law established by a rule of the international organization.

Article 9[551]

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 10[552]

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

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[549] For the commentary to this chapter, see *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10) pp. 86-87.

[550] For the commentary to this article, see *ibid.*, 87-90.

[551] For the commentary, see *ibid.*, p. 91.

[552] For the commentary, see *ibid.*, p. 92.

Article 11[553]

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV[554]

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 12[555]

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 13[556]

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

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[553] For the commentary, see *ibid.*

[554] For the commentary to this chapter, see *ibid.*, pp. 92-96.

[555] For the commentary to this article, see *ibid.*, pp. 96-97.

[556] For the commentary, see *ibid.*, pp. 97-99.

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 14[557]

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

Article 15 [16][558]

Decisions, recommendations and authorizations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) That State or international organization commits the act in question in reliance on that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

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[557] For the commentary, see *ibid.*, pp. 99-100.

[558] For the commentary, see *ibid.*, pp. 101-105. The square bracket refers to the corresponding article in the third report of the Special Rapporteur (A/CN.4/553).

Article 16 [15][559]

Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 17[560]

Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 18[561]

Self-defence

The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the principles of international law embodied in the Charter of the United Nations.

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[559] For the commentary, see *ibid.*, p. 105.

[560] For the commentary, see section C.2 below.

[561] For the commentary, see section C.2 below.

Article 19[562]

Countermeasures

...*[563]

Article 20[564]

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

Article 21[565]

Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

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[562] For the commentary, see section C.2 below.

[563] Draft article 19 concerns countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State as circumstances precluding wrongfulness. The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization will be examined in the context of the implementation of the responsibility of an international organization.

[564] For the commentary, see section C.2 below.

[565] For the commentary, see section C.2 below.

Article 22[566]

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(*a*) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The organization has contributed to the situation of necessity.

Article 23[567]

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 24[568]

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

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[566] For the commentary, see section C.2 below.

[567] For the commentary, see section C.2 below.

[568] For the commentary, see section C.2 below.

CHAPTER (x)[569]

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

Article 25[570]

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 26[571]

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

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[569] The location of this chapter will be determined at a later stage.

[570] For the commentary, see section C.2 below.

[571] For the commentary, see section C.2 below.

Article 27[572]

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

Article 28[573]

International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 29[574]

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) It has accepted responsibility for that act; or

(*b*) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

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[572] For the commentary, see section C.2 below.

[573] For the commentary, see section C.2 below.

[574] For the commentary, see section C.2 below.

Article 30[575]

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

2. Text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session

91. The text of the draft articles together with commentaries thereto provisionally adopted by the Commission at its fifty-eighth session is produced below.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

General commentary

(1) Under the heading "Circumstances precluding wrongfulness" articles 20 to 27 on responsibility of States for internationally wrongful acts[576] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[577] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason for holding that circumstances precluding wrongfulness of conduct of States could not be

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[575] For the commentary, see section C.2 below.

[576] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), pp. 169-211.

[577] *Ibid.*, p. 169, para. 2.

relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

Article 17

Consent

> Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Commentary

(1) This text corresponds to article 20 on responsibility of States for internationally wrongful acts.[578] As the commentary explains,[579] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[580]

(2) Like States, international organizations perform several functions which would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on its territory by a commission of inquiry set up by the United Nations Security Council.[581]

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[578] *Ibid.*, p. 173, with the related commentary, at pp. 173-177.

[579] *Ibid.*, p. 173, para. 1.

[580] *Ibid.*, p. 174, para. 2.

[581] For the requirement of consent, see para. 6 of the Declaration annexed to General Assembly resolution 46/59 of 9 December 1991.

Another example is consent by a State to the verification of the electoral process by an international organization.[582] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[583]

(4) Consent dispensing with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility",[584] such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor. The requirement that consent does not affect compliance with peremptory norms is stated in draft article 23. This is a general provision covering all the circumstances precluding wrongfulness.

(5) Draft article 17 is based on article 20 on Responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an "international organization" with regard to the entity giving consent and the replacement of the term "State" with "international organization" with regard to the entity to which consent is given.

Article 18

Self-defence

> The wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the principles of international law embodied in the Charter of the United Nations.

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[582] With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16.

[583] A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, 10 September 2005, L 234, p. 13.

[584] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 174, para. 4.

Commentary

(1) According to the commentary to the corresponding article (article 21) on Responsibility of States for internationally wrongful acts, that article considers "self-defence as an exception to the prohibition against the use of force".[585] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> "[...] the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter."[586]

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international organizations, although it is likely to be relevant only for a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a wider sense, with regard to situations other than those contemplated in Article 51 of the United Nations Charter. References to "self-defence" have been made also in relation to the "defence of the mission".[587] For instance, in relation to the United Nations Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

> "'self-defence' could well include the defence of the safe areas and the civilian population in those areas."[588]

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[585] *Ibid.*, p. 177, para. 1.

[586] *Ibid.*, p. 180, para. 6.

[587] As was noted by the High-Level Panel on Threats, Challenges and Change, "the right to use force in self-defence [...] is widely understood to extend to the 'defence of the mission'". A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change (A/59/565), para. 213.

[588] *Canadian Yearbook of International Law*, vol. 34 (1996), p. 388, at p. 389.

While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases which go well beyond those in which a State or an international organization responds to an armed attack by a State. At any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also the conditions under which an international organization may resort to force in response to an armed attack by a State pertain to the primary rules and need not be examined in the present context. One of those questions relates to the invocability of collective self-defence on the part of an international organization when one of its member States has become the object of an armed attack and the international organization is given the power to act in collective self-defence.[589]

(5) With regard to article 21 on Responsibility of States for internationally wrongful acts concerning self-defence, what is required in the present context is only to state that measures of self-defence should be regarded as lawful. In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations has been replaced here with that to "principles of international law embodied in the Charter of the United Nations". This wording already appears, for similar reasons, in article 52 of the Vienna Convention on the Law of Treaties,[590] concerning invalidity of treaties because of coercion, and in the corresponding article of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[591] The only other change with regard to the text of article 21 on Responsibility of States for internationally wrongful acts concerns the replacement of the term "State" with "international organization".

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[589] A positive answer is implied in article 25 (a) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the member States of the Economic Community of West Africa (ECOWAS), which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof". The text of this provision is reproduced by A. Ayissi (ed.), *Cooperation for Peace in West Africa. An Agenda for the 21st Century* (UNIDIR, Geneva, 2001), p. 127.

[590] United Nations, *Treaty Series*, vol. 1155, p. 331.

[591] *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II.

Article 19

Countermeasures

...*

Article 20

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on Responsibility of States for internationally wrongful acts as "an irresistible force or [...] an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation".[592] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

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* Draft article 19 concerns countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State as circumstances precluding wrongfulness. The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization will be examined in the context of the implementation of the responsibility of an international organization.

[592] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 183, with the related commentary, at pp. 183-188.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and the World Health Organization stated that:

> "[i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal."[593]

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of *force majeure* does not constitute a breach of the Agreement.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.[594] In Judgement No. 24, *Torres et al. v. Secretary General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force majeure*, which had been made in order to justify termination of an official's contract:

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[593] United Nations, *Treaty Series*, vol. 1691, p. 325 at p. 331.

[594] These cases related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary to draft article 8. See *Official Records of the General-Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 86-87.

> "The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature."[595]

Although the Tribunal rejected the plea, it clearly recognized the invocability of *force majeure*.

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said:

> "*Force majeure* is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent."[596]

It is immaterial that in the case in hand *force majeure* had been invoked by the employee against the international organization instead of by the organization.

(6) The text of draft article 20 differs from that of article 23 on Responsibility of States for internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

Article 21

Distress

> 1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

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[595] Paragraph 3 of the judgement, made on 16 November 1976. The text is available at http://www.oas.org/tribadm/decisiones_decisions/judgments. In a letter dated 8 January 2003 to the United Nations Legal Counsel, the Organization of American States (OAS) noted that:

> "The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary-General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law." (See A/CN.4/545, sect. II.I.)

[596] Paragraph 3 of the judgement, made on 19 June 1985. The Registry's translation from the original French, available at http://www.ilo.org/public/english/tribunal.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 on Responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care".[597] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters for seeking shelter during a heavy storm,[598] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[599]

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity[600] is not always obvious. The commentary to article 24 notes that "general cases of emergencies [...] are more a matter of necessity than distress".[601]

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[597] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 189, with the related commentary, pp. 189-194.

[598] *Ibid.*, p. 190, para. 3.

[599] *Ibid.*, p. 191, para. 4.

[600] Necessity is considered in the following draft article.

[601] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 193, para. 7.

(4) Article 24 on responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress and the act in question is not likely to create a comparable greater peril. These conditions appear to be equally applicable to international organizations.

(5) Draft article 21 is textually identical to the corresponding article on State responsibility, with the only changes due to the replacement of the term "State" once with the term "international organization" and twice with the term "organization".

Article 22

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The organization has contributed to the situation of necessity.

Commentary

(1) Conditions for the invocability of necessity by States have been listed in article 25 on responsibility of States for internationally wrongful acts.[602] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgement No. 2183 of the ILO Administrative Tribunal in the *T.O.R.N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> "[...] in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care."[603]

(3) Even if practice is scarce, as was noted by the International Criminal Police Organization:

> "[...] necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations."[604]

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[602] *Ibid.*, p. 194, with the related commentary, pp. 194-206.

[603] Paragraph 9 of the judgement, made on 3 February 2003. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

[604] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, pp. 40-41).

The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[605] the International Monetary Fund,[606] the World Intellectual Property Organization[607] and the World Bank.[608]

(4) While the conditions set by article 25 on Responsibility of States for internationally wrongful acts are applicable also with regard to international organizations, the scarcity of specific practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This could be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity which appeared in the debates in the Sixth Committee[609] and also in the Commission: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations. According to some members of the Commission, although subparagraph (1) (a) only refers to the interests of the international community as a whole, an organization should nevertheless be entitled to invoke necessity for protecting an essential interest of its member States.

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[605] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see A/CN.4/556, p. 40).

[606] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (see A/CN.4/556, p. 42).

[607] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (see A/CN.4/556, pp. 42-43).

[608] Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (see A/CN.4/568, pp. 8-9).

[609] Statements clearly in favour of the invocability of necessity by international organizations were made by France (A/C.6/59/SR.22, para. 12), Austria (A/C.6/59/SR.22, para. 23), Denmark, speaking also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/59/SR.22, para. 65), Belgium (A/C.6/59/SR.22, para. 76), the Russian Federation (A/C.6/59/SR.23, para. 23) and Cuba (A/C.6/59/SR.23, para. 25). A tentatively favourable position was taken also by Spain (A/C.6/59/SR.23, para. 49). The contrary view was expressed in statements by Germany (A/C.6/59/SR.21, para. 22), China (A/C.6/59/SR.21, para. 42), Poland (A/C.6/59/SR.22, para. 2), Belarus (A/C.6/59/SR.22, para. 45) and Greece (A/C.6/59/SR.23, para. 43). Tentatively negative positions were taken by Singapore (A/C.6/59/SR.22, para. 57) and New Zealand (A/C.6/59/SR.23, para. 10).

(5) There is no contradiction between the reference in subparagraph (1) (a) to the protection of an essential interest of the international community and the condition in subparagraph (1) (b) that the conduct in question should not impair an essential interest of the international community. The interests in question are not necessarily the same.

(6) In view of the solution adopted for subparagraph (1) (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of the international community, the essential interests of international organizations have not been added in subparagraph (1) (b) to those that should not be seriously impaired.

(7) Apart from the change in subparagraph (1) (a) the text reproduces article 25 on Responsibility of States for internationally wrongful acts, with the replacement of the term "State" with the terms "international organization" or "organization" in the chapeau of both paragraphs.

Article 23

Compliance with peremptory norms

> Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) Chapter V of part one of the articles on Responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision - article 26 - is to state that an act, which would otherwise not be considered wrongful, would be so held if it was "not in conformity with an obligation arising under a peremptory norm of general international law".[610]

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[610] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 206, with the related commentary, pp. 206-209.

(2) The commentary to article 26 on Responsibility of States for internationally wrongful acts, provides that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[611] In its judgement in the *Case concerning armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the International Court of Justice found that the prohibition of genocide "assuredly" was a peremptory norm.[612]

(3) Since peremptory norms also bind international organizations, it is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a "without prejudice" provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on Responsibility of States for internationally wrongful acts with the only replacement of the term "State" with "international organization".

Article 24

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 on Responsibility of States for internationally wrongful acts makes two points.[613] The first point is that a circumstance precludes wrongfulness only if and to the extent

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[611] *Ibid.*, p. 208, para. 5.

[612] Para. 64 of the judgement, available at http://www.icj-cij.org.

[613] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 209, with the related commentary, pp. 209-211.

that the circumstance exists. While the wording appears to emphasize the element of time,[614] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

(2) The second point is that the question of compensation is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on Responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, draft article 24 is identical to the corresponding article on Responsibility of States for internationally wrongful acts.

CHAPTER (x)[615]

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

General commentary

(1) In accordance with draft article 1, paragraph 2[616] of the present chapter is intended to fill a gap that was deliberately left in the articles on Responsibility of States for internationally wrongful acts. As stated in article 57 on Responsibility of States for internationally wrongful acts, these articles are "without prejudice to any question of the responsibility of [...] any State for the conduct of an international organization".[617]

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the articles on

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[614] This temporal element may have been emphasized because the International Court of Justice had said in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives". *I.C.J. Reports 1997*, p. 63, para. 101.

[615] The location of the chapter will be determined at a later stage.

[616] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 34-37.

[617] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 76.

Responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether a certain conduct is to be attributed to a State or to an international organization or to both, the present draft articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on State responsibility for internationally wrongful acts will regulate attribution of conduct to the State.

(3) The present chapter assumes that there exists conduct attributable to an international organization. In most cases, it also assumes that that conduct is internationally wrongful. However, exceptions are provided for the cases envisaged in draft articles 27 and 28, which respectively deal with coercion of an international organization by a State and with international responsibility in case of provision of competence to an international organization.

(4) According to draft articles 28 and 29, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in draft articles 25, 26 and 27, the responsible State may or may not be a member.

(5) The present chapter does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part One of the present draft already considers the responsibility that an international organization may incur when it aids or assists or directs and controls in the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Following draft articles 28 and 29, which consider further cases of responsibility of States as members of an international organization, additional provisions would have to be introduced in chapter IV in order to deal with parallel situations concerning international organizations as members of other international organizations. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall beyond the scope of the present draft.

(6) The position of the present chapter within the structure of the draft still needs to be determined. For this reason the chapter is provisionally called "Chapter (x)". Should the current position be retained, it could constitute a separate part or the final chapter of Part One. In the latter case, Part One would have to be given a more appropriate heading.

Article 25

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Commentary

(1) Draft article 25 addresses a situation parallel to the one covered in draft article 12, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization.[618] Both draft articles closely follow the text of article 16 on Responsibility of States for internationally wrongful acts.[619]

(2) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, it cannot be totally ruled out that aid or assistance could result from conduct taken by the State within the framework of the organization. This could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

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[618] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 96-97.

[619] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 76.

(3) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear State party to the Treaty on the Non-Proliferation of Nuclear Weapons[620] would have to refrain from assisting a non-nuclear State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear States are members. In that case, international responsibility that may arise for the State would have to be determined in accordance with the articles on Responsibility of States for internationally wrongful acts.

(4) Draft article 25 sets under (a) and (b) the conditions for international responsibility to arise for the aiding or assisting State. The draft article uses the same wording as article 16 on Responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(5) The heading of article 16 on Responsibility of States for internationally wrongful acts has been slightly adapted, by introducing the words "by a State", in order to distinguish the heading of the present draft article from that of draft article 12.

Article 26

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

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[620] United Nations, *Treaty Series*, vol. 729, p. 161.

Commentary

(1) While draft article 13 relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization,[621] draft article 26 considers the case in which direction and control are exercised by a State. Both draft articles closely follow the text of article 17 on Responsibility of States for internationally wrongful acts.[622]

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in draft article 25 and the related commentary, a distinction has to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present draft article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous draft article.

(3) Draft article 26 sets under (a) and (b) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 on Responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

(4) With regard to article 17 on Responsibility of States for internationally wrongful acts, the heading of the present draft article has been slightly adapted, by adding the words "by a State", in order to distinguish it from the heading of draft article 13.

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[621] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 97-99.

[622] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 76.

Article 27

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

Commentary

(1) Draft article 14 deals with coercion by an international organization in the commission of what would be, but for the coercion, a wrongful act of another international organization.[623] The present draft article concerns coercion by a State in a similar situation. Both draft articles closely follow draft article 18 on Responsibility of States for internationally wrongful acts.[624]

(2) The State coercing an international organization may or may not be a member of that organization. Should the State be a member, a distinction that is similar to the one that was made with regard to the previous two draft articles has to be made between participation in the decision-making process of the organization according to its pertinent rules, on the one hand, and coercion, on the other hand.

(3) The conditions that draft article 27 sets for international responsibility to arise are identical to those that are listed in article 18 on Responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

(4) The heading of the present draft article slightly adapts that of article 18 on Responsibility of States for internationally wrongful acts by introducing the words "by a State": this in order to distinguish it from the heading of draft article 14.

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[623] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 99-100.

[624] *Ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 76.

Article 28

International responsibility in case of provision of competence to an international organization

1. A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Commentary

(1) Draft article 28 concerns a situation which is to a certain extent analogous to those considered in draft article 15.[625] According to that draft article, an international organization incurs international responsibility when it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization. Draft article 15 also considers circumvention through authorizations or recommendations given to member States or international organizations. The present draft article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

(2) As the commentary on draft article 15 explains, the existence of a specific intention of circumvention is not required and responsibility cannot be avoided by showing the absence of an intention to circumvent the international obligation.[626] The use of the term "circumvention" is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if taken by the State,

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[625] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 100-105.

[626] *Ibid.*, p. 102, para. 4.

has to be regarded as an unwitting result of providing the international organization with competence. On the other hand, the term "circumvention" does not refer only to cases in which the member State may be said to be abusing its rights.[627]

(3) The jurisprudence of the European Court of Human Rights provides a few examples of States being held responsible when they have provided competence to an international organization and have failed to ensure compliance with their obligations under the European Convention of Human Rights. In *Waite and Kennedy v. Germany* the Court examined the question as to whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency, of which it was a member, in relation to claims concerning employment. The Court said that:

> "Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[628]

(4) In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland* the Court took a similar approach with regard to a State measure implementing a regulation of the

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[627] In article 5 (b) of a resolution adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", the Institute of International Law stated: "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as […] the abuse of rights." *Annuaire de l'Institut de Droit international*, vol. 66-II (1996), p. 445.

[628] Judgment of 18 February 1999, *Reports of Judgments and Decisions*, 1999-I, p. 392 at p. 410, para. 67. The Court concluded that the "essence of the applicant's 'right to a court'" under the Convention had not been impaired (p. 412, para. 73). After examining the dictum in *Waite and Kennedy v. Germany* reproduced above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application". Views similar to those of the European Court of Human Rights were expressed by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di Diritto internazionale*, vol. 57 (1974), p. 270 at pp. 275-276; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/Boston/London: Nijhoff, 1995), p. 179; K. Zemanek, in *Annuaire* …, vol. 66-I (1995), p. 329; P. Sands, in P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), p. 64.

European Community. The Court said that a State could not free itself from its obligations under the European Convention of Human Rights by transferring functions to an international organization, because:

> "Absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]."[629]

(5) According to the present draft article, two elements are required for international responsibility to arise. The first one is that the State provides the international organization with competence in relation to the international obligation that is circumvented. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for the purposes of international responsibility to arise according to the present draft article, is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(6) The second condition for international responsibility to arise is that the international organization commits an act that, if committed by the State, would have constituted a breach of that obligation. The fact that the organization is not bound by the obligation is not sufficient for international responsibility to arise. An act that would constitute a breach of the obligation has to be committed. On the other hand, there is no requirement that the State cause the international organization to commit the act in question.

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[629] Judgment of 30 June 2005, not yet reported, para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were protected within the European Community "in a manner which can be considered at least equivalent to that for which the Convention provides" (para. 155).

(7) Paragraph 2 explains that draft article 28 does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the sheer existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(8) Should the act of the international organization be wrongful and the act be caused by the member State, there could be an overlap between the cases covered in draft article 28 and those considered in the three previous articles. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

Article 29

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to draft articles 25 to 28, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) It has accepted responsibility for that act; or

(*b*) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Commentary

(1) The saving clause with reference to draft articles 25 to 28 at the beginning of paragraph 1 of the present draft article intends to make it clear that a State member of an international organization may be held responsible also in accordance with the previous draft articles. Therefore draft article 29 envisages two additional cases in which member States incur

responsibility. Member States may furthermore be responsible according to the articles on Responsibility of States for internationally wrongful acts,[630] but this need not be the object of a saving clause since it is beyond the scope of the present draft.

(2) Consistently with the approach generally taken by the present draft as well as by the articles on Responsibility of States for internationally wrongful acts, the present draft article positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. Although some members did not agree, the Commission found that it would be inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which, according to the draft, responsibility does not arise for a State in connection with the act of an international organization. It is however clear that such a conclusion is implied and that membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The German Government recalled in a written comment that it had:

> "Advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and the International Court of Justice (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations."[631]

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman. Lord Kerr said that he could not:

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[630] This would apply to the case envisaged by the Institute of International Law in article 5 (c) (ii) of its resolution on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties": the case that "the international organization has acted as the agent of the State, in law or in fact". *Annuaire* ..., vol. 66-II (1996), p. 445.

[631] A/CN.4/556, p. 65.

> "Find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable - let alone jointly and severally - in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name."[632]

In the House of Lords, with regard to an alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

> "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA6 [the Sixth International Tin Agreement] in 1982 or afterwards."[633]

(5) Although doctrine is divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that:

> "Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[634]

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[632] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry, J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, in ILR, vol. 80, p. 109.

[633] Judgment of 26 October 1989, *Australia & New Zealand Banking Group Ltd. and Others v. Commonwealth of Australia and 23 Others, Amalgamated Metal Trading Ltd. and Others v. Department of Trade and Industry and Others; Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; Maclaine Watson & Co. Ltd. v. International Tin Council*, in ILM, vol. 29 (1990), p. 675.

[634] Article 6 (a). *Annuaire* ..., vol. 66-II (1996), p. 445. Article 5 reads as follows: "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization; (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights; (c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the international organization has acted as the agent of the State, in law or in fact."

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous draft articles, in which a State would be responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (a). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his opinion in the judgment of the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[635] One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.[636] It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.[637]

(8) Paragraph 1 envisages a second case of responsibility of member States: when the conduct of member States has given the third party reason to rely on the responsibility of member States: for instance, that they would stand in if the responsible organization did not have the necessary funds for making reparation.[638]

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[635] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, in ILR, vol. 80, p. 172.

[636] The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply. United Nations, *Treaty Series*, vol. 1155, p. 331.

[637] For instance, article 300, paragraph 7, of the Treaty establishing the European Community reads as follows: "Agreements concluded under the conditions set out in this article shall be binding on the institutions of the Community and on Member States." The European Court of Justice pointed out that this provision does not imply that member States are bound towards non-member States and may as a consequence incur responsibility towards them under international law. See judgment of 9 August 1994, *France v. Commission*, Case C-327/91, *European Court of Justice Reports*, 1994, p. I-3641 at p. I-3674, para. 25.

[638] C.F. Amerasinghe, "Liability to third parties of member States of international organizations: practice, principle and juridical precedent", ICLQ, vol. 40 (1991), p. 259 at p. 280, held that, on the basis of "policy reasons", "the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument". P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en*

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning Western Helicopters. The panel found that the special circumstances of the case invited:

> "the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States."[639]

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,[640] although this factor together with all the pertinent factors would have to be considered globally. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraph (b) uses the term "injured party". In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the articles on Responsibility of States for internationally wrongful acts considers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 a saving clause concerning the rights that may arise for "any person or entity other than a State".[641] Similarly, subparagraph (b) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

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droit des gens (Bruxelles: Bruylant/Editions de l'Université, 1998), pp. 509-510 also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization.

[639] Paragraph 56 of the award of 21 July 1991, quoted by R. Higgins, "The legal consequences for Member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report", *Annuaire* ..., vol. 66-I (1995), p. 373 at p. 393.

[640] See the comment made by Belarus, A/C.6/60/SR.12, para. 52.

[641] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 76.

(12) According to subparagraphs (a) and (b) international responsibility arises only for those member States who accepted that responsibility or whose conduct induced reliance. Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

(13) Paragraph 2 considers the nature of the responsibility that is entailed in accordance with paragraph 1. Acceptance of responsibility by a State could relate either to subsidiary or to joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, one could only state a rebuttable presumption. Also in view of the limited nature of the cases in which responsibility arises according to the present draft article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.[642]

Article 30

Effect of this chapter

> This chapter is without prejudice to international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

Commentary

(1) The present draft article finds a parallel in draft article 16, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is "without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization".

(2) Draft article 30 is a saving clause relating to the whole chapter. It corresponds to article 19 on Responsibility of States for internationally wrongful acts.[643] The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility

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[642] In the opinion referred to above, Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, in ILR, vol. 80, p. 172, Lord Ralph Gibson held that, in case of acceptance of responsibility, "direct secondary liability has been assumed by the members".

[643] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), p. 168.

of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary on article 19 explains, the article is also intended to make it clear "that the provisions of the chapter are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful" and to preserve the responsibility of any other State "to whom the internationally wrongful conduct might also be attributable under other provisions of the articles".[644]

(3) There appears to be less need for an analogous "without prejudice" provision in a chapter concerning responsibility of States which is included in a draft on responsibility of international organizations. It is hardly necessary to save responsibility that may arise for States according to articles on Responsibility of States for internationally wrongful acts and not according to the present draft. On the contrary, a "without prejudice" provision analogous to that of article 19 on Responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in the chapter of a provision analogous to article 19 could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in saying that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

(4) In the present draft article the references to the term "State" in article 19 on Responsibility of States for internationally wrongful acts have been replaced by references to the term "international organization".

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[644] *Ibid.*, pp. 168-169.

CHAPTER VIII

RESERVATIONS TO TREATIES

A. Introduction

92. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

93. At its forty-sixth session (1994), the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[645]

94. At its forty-seventh session (1995), the Commission received and discussed the first report of the Special Rapporteur.[646]

95. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[647] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

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[645] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[646] A/CN.4/470 and Corr.1.

[647] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

96. In 1995, the Commission, in accordance with its earlier practice,[648] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[649]

97. At its forty-eighth session (1996), the Commission had before it the Special Rapporteur's second report on the topic.[650] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[651]

98. At its forty-ninth session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[652]

99. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

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[648] See *Yearbook … 1993*, vol. II (Part Two), para. 286.

[649] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

[650] A/CN.4/477 and Add.1.

[651] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[652] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

100. From its fiftieth session (1998) to its fifty-seventh session (2005) the Commission considered 8 more reports[653] by the Special Rapporteur[654] and provisionally adopted 71 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

101. At the current session, the Commission had before it the second part of the tenth report of the Special Rapporteur (A/CN.4/558/Add.1 and Corr.1 and Corr.2 and Add.2) on validity of reservations and the concept of the object and purpose of the treaty. In this regard the Special Rapporteur, after the debate that took place during the fifty-seventh session (2005), had also prepared a note (A/CN.4/572 and Corr.1) relating to draft guideline 3.1.5 (Definition of the object and purpose of the treaty) and presenting a new version of this guideline including two alternative texts. The Special Rapporteur also submitted his Eleventh report (A/CN.4/574) and the Commission decided to consider it at its fifty-ninth session (2007).

102. The Commission considered the second part of the tenth report of the Special Rapporteur at its 2888th to 2891st meetings, on 5, 6, 7 and 11 July 2006.

103. At its 2891st meeting, held on 11 July 2006, the Commission decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.

104. At its 2883rd meeting, on 6 June 2006, the Commission considered and provisionally adopted draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations) to the Drafting Committee. Moreover the Commission provisionally adopted draft guidelines 1.6 (Scope of definitions) and 2.1.8 [2.1.7 *bis*] (Procedure in case of manifestly invalid reservations) as redrafted.

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[653] Third report (A/CN.4/491 and Corr.1 (English only), Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (A/F/R only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); Fourth report (A/CN.4/499); Fifth report (A/CN.4/508, Add.1, Add.2, Add.3 and Add.4); Sixth report (A/CN.4/518 and Add.1-3); Seventh report (A/CN.4/526 and Add.1-3); Eighth report (A/CN.4/535 and Add.1); Ninth report (A/CN.4/544); and Tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2).

[654] For a detailed historical presentation, see *Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257-269.

105. Those draft guidelines had already been sent to the Drafting Committee at the fifty-seventh session (2005).

106. At its 2911th and 2912th meetings, on 9 and 10 August 2006, the Commission adopted the commentaries relating to the aforementioned draft guidelines.

107. The text of the draft guidelines and the commentaries thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of the second part of his tenth report

108. The Special Rapporteur recalled that, for lack of time, one portion of his tenth report could not be considered in depth during the previous Commission session and the final part concerning the validity of reservations had not been considered at all. In the light of the criticisms of the definition of the object and purpose of the treaty that had been voiced during the debate at the fifty-seventh session, the Special Rapporteur had formulated a new definition of the object and purpose of the treaty (A/CN.4/572 and Corr.1).[655] For the new definition he offered two alternatives, not very different in their general meaning, although he preferred the first alternative. In the second addendum to his tenth report (A/CN.4/588/Add.2), the Special Rapporteur had tried to give a pragmatic answer to two important and difficult questions: who was competent to assess the validity of reservations and what were the consequences of an invalid reservation.

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[655] **Alternative 1:**

3.1.5 Definition of the object and purpose of the treaty

For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential rules, rights and obligations indispensable to the general architecture of the treaty, which constitute the *raison d'être* thereof and whose modification or exclusion could seriously disturb the balance of the treaty.

Alternative 2:

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation shall be incompatible with the object and purpose of the treaty if it has a serious impact on the essential rules, rights or obligations indispensable to the general architecture of the treaty, thereby depriving it of its *raison d'être*.

109. With regard to draft guideline 3.2,[656] the Special Rapporteur said that it followed from articles 20, 21 and 23 of the Vienna Conventions that any contracting State or international organization could assess the validity of the reservations formulated with respect to a treaty. In that regard the term "State" meant the entire State apparatus, including, as applicable, the domestic courts. Such an assessment could also be made by the courts of the reserving State, although the Special Rapporteur was aware of only a single case in which a domestic court had declared a reservation formulated by the State invalid.[657] In order to take that possibility into account, the wording of the first bullet point of draft guideline 3.2 should be changed by deleting the word "other" before "contracting States" and before "contracting organizations". The dispute settlement bodies and the treaty implementation monitoring bodies could also rule on the validity of reservations. But it should be noted that the category of treaty monitoring bodies was relatively a new one and had not become well developed until after the adoption of the 1969 Vienna Convention.

110. The considerations that had led the Commission in 1997 to adopt preliminary conclusions on reservations to normative multilateral treaties including human rights treaties were still relevant. The third bullet point of draft guideline 3.2 reflected practice and corresponded to paragraph 5 of the preliminary conclusions.

111. Draft guideline 3.2.1[658] spelled out that idea, at the same time indicating that, in so doing, monitoring bodies could go no further than their general mandate authorized. If they had

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[656] **3.2 Competence to assess the validity of reservations**

The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

- The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;
- Dispute settlement bodies that may be competent to interpret or apply the treaty; and
- Treaty implementation monitoring bodies that may be established by the treaty.

[657] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. Conseil d'État du Canton de Thurgovie* (*Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523-537).

[658] **3.2.1 Competence of the monitoring bodies established by the treaty**

Where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization.

The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role.

decision-making power, they could also decide as to the validity of reservations, and their decisions in that regard would be binding on States parties; otherwise, they could only make recommendations. That was also in keeping with paragraph 8 of the preliminary conclusions.

112. Draft guideline 3.2.2[659] echoed paragraph 7 of the preliminary conclusions in the form of a recommendation and was very much in keeping with the pedagogic spirit of the Guide to Practice, as was draft guideline 3.2.3,[660] which reminded States and international organizations that they should give effect to the decisions of the treaty monitoring bodies (if they had decision-making power) or to take account of their recommendations in good faith.

113. Draft guideline 3.2.4,[661] corresponding to paragraph 6 of the preliminary conclusions adopted in 1997, recalled that, when there were several mechanisms for assessing the validity of reservations, they were not mutually exclusive but supportive.

114. The last section of the tenth report deals with the consequences of the invalidity of a reservation, a matter that constituted one of the most serious gaps on the topic in the Vienna Conventions, which were silent on that point, whether deliberately or otherwise.

115. Despite the positions taken by certain authors, who draw a distinction between subparagraphs (a) and (b) of article 19, on the one hand, and subparagraph (c) on the other, the Special Rapporteur was of the view that all the three subparagraphs had the same function

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[659] **3.2.2 Clauses specifying the competence of monitoring bodies to assess the validity of reservations**

States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.

[660] **3.2.3 Cooperation of States and international organizations with monitoring bodies**

States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body's assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence.]

[661] **3.2.4 Plurality of bodies competent to assess the validity of reservations**

When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty.

(a view supported by the *travaux préparatoires*, practice and case law). The unity of article 19, which was confirmed by article 21, paragraph 1, of the Vienna Conventions, was expressed in draft guideline 3.3.[662]

116. The Special Rapporteur then sought to respond to some of the questions to which a response could be given at that stage. Draft guideline 3.3.1[663] explained that the formulation of an invalid reservation posed problems of validity, not of the responsibility of its author. Hence, draft guideline 3.3.2[664] expressed the idea that a reservation that did not fulfil the conditions for validity set forth in article 19 of the Vienna Conventions was null and void.

117. Draft guideline 3.3.3[665] expressed the idea that the other contracting parties, acting unilaterally, could not remedy the nullity of a reservation that did not meet the criteria of article 19. Otherwise, the unity of the treaty regime would be broken up, which would be incompatible with the principle of good faith.

118. The Special Rapporteur was of the view that what the contracting parties could not do unilaterally they might do collectively, provided they did it expressly, which would amount to an amendment of the treaty. If all parties formally accepted a reservation that was *a priori* invalid, they could be considered to be amending the treaty by unanimous agreement, as article 39 of the Vienna Conventions allowed. That idea was expressed in draft guideline 3.3.4.[666]

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[662] **3.3 Consequences of the non-validity of a reservation**

A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

[663] **3.3.1 Non-validity of reservations and responsibility**

The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.

[664] **3.3.2 Nullity of invalid reservations**

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

[665] **3.3.3 Effect of unilateral acceptance of an invalid reservation**

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

[666] **3.3.4 Effect of collective acceptance of an invalid reservation**

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and its purpose, may be formulated by a State or an international organization if none of the other contracting parties object to it after having been expressly consulted by the depositary.

2. Summary of the debate

119. With regard to draft guideline 3.1.5, in the new version proposed by the Special Rapporteur, it was pointed out that the notion of "the balance of the treaty" was not necessarily applicable to all treaties, particularly those relating to human rights. The object and purpose of a treaty consisted in the objective underlying the essential rules, rights and obligations, rather than within those rules, rights and obligations themselves.

120. According to another point of view, the reference to "essential rules, rights and obligations" in the new version was a better way to describe the *raison d'être* of a treaty.

121. The view was also expressed that the revised version of the draft guideline introduced terms that were difficult to understand and interpret and were extremely subjective. The earlier version accompanied by commentary would be a more appropriate way to clarify the notion of object and purpose. It was also pointed out that the phrase "has a serious impact" appeared to make the scope of the draft guideline very restrictive. It was noted that a reservation, without necessarily compromising the *raison d'être* of the treaty, might nonetheless compromise an essential part of it and thus be incompatible with its object and purpose.

122. The view was also expressed that when a treaty prohibited all reservations, it did not necessarily mean that all the provisions of the treaty constituted its *raison d'être*, and, conversely, when a treaty allowed specific reservations it did not necessarily mean that the particular provisions that might be the subject of reservations were not essential. The political context in which the treaty had been concluded should also be taken into account.

123. With regard to draft guideline 3.1.6, it was pointed out that the reference to "the articles that determine" the "basic structure" of the treaty gave the impression that the object and purpose of a treaty was to be found in certain provisions of the treaty, which was not necessarily the case. The reference to subsequent practice could be deleted, since the intention of the parties at the

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During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of the legal problems raised by the reservation.

time the treaty was concluded was the essential consideration. The view was also expressed that the reference to the "subsequent practice of the parties" should be deleted both for the sake of consistency with previous decisions of the Commission and for the sake of the stability of treaty relations. However, another view held that the reference to subsequent practice should be retained and was an essential element of interpretation according to article 31 of the Vienna Conventions.

124. With regard to draft guideline 3.1.7, it was observed that even vague, general reservations were not necessarily incompatible with the object and purpose of the treaty, since they might affect matters of lesser importance.

125. Several members voiced support for draft guideline 3.1.8.

126. With regard to draft guideline 3.1.9, the view was expressed that it might be possible to formulate a reservation to some aspect of a treaty provision setting forth a rule of *jus cogens* that did not actually contradict the *jus cogens* rule itself.

127. With regard to draft guideline 3.1.10, it was observed that a reservation might be made to a provision relating to non-derogable rights provided the reservation was not incompatible with the object and purpose of the treaty as a whole.

128. Several members expressed support for draft guidelines 3.1.11, 3.1.12 and 3.1.13.

129. The view was expressed that another category of reservations deserved mention, namely, reservations to provisions relating to the implementation of the treaty through domestic legislation.

130. With regard to draft guideline 3.2, it was stressed that the competence of treaty monitoring bodies was not automatic unless provided for by the treaty. It was also suggested that the text should refer to "monitoring bodies that may be established within the framework of the treaty" rather than "by the treaty" in order to include bodies established subsequently, such as the Committee on Economic, Social and Cultural Rights. The question was raised whether monitoring bodies with quasi-judicial functions could rule on the legality of reservations formulated by States even if such a power was not expressly foreseen in the treaty.

131. The view was expressed that the draft guideline departed from positive treaty law and the practice of States in conferring competence on monitoring bodies to rule on (rather than simply to assess) the validity of reservations. Others held the contrary view.

132. Some members thought that draft guidelines 3.2.1 and 3.2.2 should state that the monitoring bodies were competent to the extent provided by the treaty. The point was also made that the monitoring bodies did not take account of the positions adopted by the contracting States, an issue that was at the heart of the problem of the competence of such bodies to assess the validity of reservations.

133. Among the dispute settlement bodies, judicial bodies deserved special mention, since their decisions produced effects quite different from those produced by the decisions of other organs.

134. The point was made that national authorities other than courts might have occasion, within their sphere of competence, to consider the validity of some reservations formulated by other States.

135. It was observed that the reference to protocols might entail the risk of encouraging their use in order to limit or criticize the competence of monitoring bodies.

136. It was also pointed out that draft guideline 3.2.4 did not answer certain questions that might arise, such as what would happen if the various competent bodies did not agree on their assessment of the reservation, or its validity.

137. It was noted that the Commission had decided not to mention implicit prohibition, so that the term should be deleted from draft guideline 3.3.

138. With regard to draft guideline 3.3.1, the view was expressed that the Commission should refrain from stating a position on whether the international responsibility of a State or international organization that had formulated an invalid reservation was or was not engaged. It was stated that such an assertion does not appear to be compatible with the law of State responsibility and might even have the effect of encouraging States to formulate invalid reservations in the belief that their responsibility would not be engaged.

139. With regard to draft guidelines 3.3.2, 3.3.3 and 3.3.4, it was observed that they raised questions that it would be premature to decide at the current stage. They should be given further consideration before being referred to the Drafting Committee.

140. It was observed that an invalid reservation could not be null and void, because such a reservation could produce effects in certain situations.

141. Several members expressed doubts about draft guidelines 3.3.3 and 3.3.4, noting contradictions and ambiguities, and were not in agreement with the role of an arbitrator in the matter of reservations that the guidelines appeared to confer on the depositary.

142. It was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it.

143. It was observed, with reference to article 20 of the Vienna Conventions concerning acceptance of reservations and objections to reservations, that there was no indication in the Vienna Conventions that the article was meant to apply to invalid reservations as well. In practice, States relied on article 20 when objecting to reservations that they considered incompatible with the object and purpose of the treaty, yet still maintained contractual relations between themselves and the State that had made the reservation. The Guide to Practice should take account of that practice and give guidance to States if the practice was thought to be incompatible with the Vienna regime.

3. Special Rapporteur's concluding remarks

144. Summing up the discussion, the Special Rapporteur noted that the rich debate had afforded him insights into different points of view on the major issues and produced some interesting comments that contributed constructively to the work of the Commission.

145. With regard to draft guidelines 3.1.5 and 3.1.6, he had noted that the participants in the debate had thought that they formed a whole defining the concept of the object and purpose of a

treaty. The three versions of draft guideline 3.1.5 proposed in 2005[667] and 2006[668] could serve as a basis for a possible definition, bearing in mind, of course, the element of subjectivity inherent in the concept.

146. Since contracting States might have differing opinions on what was essential in a treaty, he was convinced that an effort should be made to identify the point of equilibrium, which he had expressed in the idea of "the general architecture" or "the balance of the treaty". He had noted, however, that the idea had not commanded general support and that the phrase "rules, rights and obligations" had been preferred to the phrase "essential conditions" of the treaty.

147. He was alive to the argument that the "*raison d'être*" of a treaty might be difficult to identify, since a treaty could have more than one *raison d'être*, if it had more than one objective or if the parties had different expectations. On the other hand, he did not think that the word "seriously" should be deleted from the phrase "could seriously disturb". Since a reservation by definition affected the integrity of a treaty, it was logical to suppose that only a serious impact was capable of threatening the object and purpose of the treaty.

148. With regard to draft guideline 3.1.6, he was doubtful about the wisdom of including a reference to the subsequent practice of the parties, although a majority of the members had been in favour of it. It was true that a treaty evolved over time, but it should be recalled that the reservation was generally formulated at the beginning of a treaty's life when practice still had little relevance. Moreover, he was not sure that the object and purpose of a treaty could evolve over time.

149. The Special Rapporteur noted that draft guidelines 3.1.7 to 3.1.13 and the pragmatic approach they represented had generally met with support. He was not sure that he had grasped how the additional category of reservations that a member had proposed, namely reservations to provisions relating to the implementation of treaties through domestic legislation, differed from those set out in draft guideline 3.1.11; however, he was not opposed to having the

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[667] A/CN.4/4/558/Add.2, annex.

[668] A/CN.4/572, paras. 7 and 8.

Drafting Committee consider whether to add a draft guideline on that point. He was persuaded by the argument put forward by several members that the vague and general nature of a reservation could cause it to be invalid, but for reasons other than incompatibility with the object and purpose of the treaty.

150. On draft guideline 3.1.9, several members had echoed the doubts that he himself had expressed at the previous session. He agreed that the draft guideline was grounded in article 53 of the Vienna Convention, rather than article 19 (c).

151. He was not insensitive to the concern of some members that reservations to provisions relating to non-derogable rights should constitute the exception and should be strictly limited; however, that concern could be dealt with by rewording draft guideline 3.1.10 and did not call into question the underlying principle.

152. The Special Rapporteur had noted with satisfaction that no member had disputed the principle that States or international organizations had competence to assess the validity of reservations. He had listened with interest to the comments of several members on the relation between that principle and article 20 of the Vienna Convention, but he felt it would be more appropriate to take up the point when the Commission considered the effects of acceptance of and objections to reservations.

153. As to the competence of dispute settlement bodies or treaty implementation monitoring bodies to assess the validity of reservations, he recalled that he had simply taken note of practice without "conferring" (or refusing to confer) powers on such bodies, which, in his view, did not have greater competence in that area than they had in general.

154. He pointed out that all the draft guidelines on that point were in keeping with the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission in 1997. He would also like to repeat his proposal to delete the word "other" in both places from the phrase "The other contacting States … or other contracting organizations" in draft guideline 3.2, in order to accommodate the point that domestic courts might have occasion to assess the validity of reservations formulated by their own State.

155. The Drafting Committee might consider the possibility of supplementing draft guideline 3.2.4 with another specifying that monitoring bodies should take into account the assessment by contracting States of the validity of reservations.

156. With regard to draft guideline 3.3.1, he was convinced that an invalid reservation did not violate the treaty to which it referred and did not engage the responsibility of its author; if the reservation was invalid, it was null and void.

157. In conclusion, the Special Rapporteur said that it would be preferable to defer a decision on draft guidelines 3.3.2, 3.3.3 and 3.3.4 until the Commission could consider the effect of objections to and acceptance of reservations.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

158. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note[669]

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[670]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

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[669] For the commentary see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[670] For the commentary to this draft guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

1.1.1 [1.1.4][671] Object of reservations[672]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[673]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[674]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[675]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[676]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

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[671] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[672] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[673] For the commentary to this draft guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

[674] For the commentary to this draft guideline, see *ibid.*, pp. 206-209.

[675] For the commentary to this draft guideline, see *ibid.*, pp. 209-210.

[676] For the commentary to this draft guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

1.1.6 Statements purporting to discharge an obligation by equivalent means[677]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[678]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[679]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[680]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[681]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

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[677] For the commentary to this draft guideline, see *ibid.*, pp. 222-223.

[678] For the commentary to this draft guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[679] For the commentary to this draft guideline, see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

[680] For the commentary to this draft guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[681] For the commentary to this draft guideline, see *ibid.*, pp. 240-249.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[682]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[683]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[684]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[685]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[686]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[687]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

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[682] For the commentary to this draft guideline, see *ibid.*, pp. 249-252.

[683] For the commentary to this draft guideline, see *ibid.*, pp. 252-253.

[684] For the commentary to this draft guideline, see *ibid.*, pp. 254-260.

[685] For the commentary to this draft guideline, see *ibid.*, pp. 260-266.

[686] For the commentary to this draft guideline, see *ibid.*, pp. 266-268.

[687] For the commentary to this draft guideline, see *ibid.*, pp. 268-270.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[688]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[689]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[690]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[691]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[692]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[688] For the commentary to this draft guideline, see *ibid.*, pp. 270-273.

[689] For the commentary to this draft guideline, see *ibid.*, pp. 273-274.

[690] For the commentary to this draft guideline, see *ibid.*, pp. 275-280.

[691] For the commentary to this draft guideline, see *ibid.*, pp. 280-284.

[692] For the commentary to this draft guideline, see *ibid.*, pp. 284-289.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[693]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[694]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[695]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[696]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[697]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of bilateral treaty by the other party[698]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

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[693] For the commentary to this draft guideline, see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[694] For the commentary to this draft guideline, see *ibid.*, pp. 247-252.

[695] For the commentary, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[696] For the commentary to this draft guideline, see *ibid.*, pp. 290-302.

[697] For the commentary to this draft guideline, see *ibid.*, pp. 302-306.

[698] For the commentary to this draft guideline, see *ibid.*, pp. 306-307.

1.6 Scope of definitions[699]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[700]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[701]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[702]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[703]

A reservation must be formulated in writing.

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[699] This draft guideline has been reconsidered and modified during the fifty-eighth session (2006). For the new commentary see section C.2 below.

[700] For the commentary see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[701] For the commentary to this draft guideline, see *ibid.*, pp. 253-269.

[702] For the commentary to this draft guideline, see *ibid.*, pp. 270-272.

[703] For the commentary to this draft guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

2.1.2 Form of formal confirmation[704]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[705]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[706]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

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[704] For the commentary to this draft guideline, see *ibid.*, pp. 67-69.

[705] For the commentary to this draft guideline, see *ibid.*, pp. 69-75.

[706] For the commentary to this draft guideline, see *ibid.*, pp. 75-79.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[707]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[708]

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

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[707] For the commentary to this draft guideline, see *ibid*., pp. 80-93.

[708] For the commentary to this draft guideline, see *ibid*., pp. 94-104.

2.1.7 Functions of depositaries[709]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 *bis*] Procedure in case of manifestly invalid reservations[710]

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.2.1 Formal confirmation of reservations formulated when signing a treaty[711]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[712]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

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[709] For the commentary to this draft guideline, see *ibid.*, pp. 105-112.

[710] This draft guideline has been reconsidered and modified during the fifty-eighth session (2006). For the new commentary see section C.2 below.

[711] For the commentary to this draft guideline, see *ibid.*, *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

[712] For the commentary to this draft guideline, see *ibid.*, pp. 472-474.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[713]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ... .[714]

2.3.1 Late formulation of a reservation[715]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[716]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[717]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[718]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

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[713] For the commentary to this draft guideline, see *ibid.*, pp. 474-477.

[714] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[715] For the commentary to this draft guideline, see *ibid.*, pp. 477-489.

[716] For the commentary to this draft guideline, see *ibid.*, pp. 490-493.

[717] For the commentary to this draft guideline, see *ibid.*, pp. 493-495.

[718] For the commentary to this draft guideline, see *ibid.*, pp. 495-499.

2.3.5 Widening of the scope of a reservation[719]

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations[720]

2.4.1 Formulation of interpretative declarations[721]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level[722]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[723]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[724]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

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[719] For the commentary see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269-274.

[720] For the commentary see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[721] For the commentary to this draft guideline, see *ibid.*, pp. 115-116.

[722] For the commentary to this draft guideline, see *ibid.*, pp. 117-118.

[723] For the commentary to this draft guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

[724] For the commentary to this draft guideline, see *ibid.*, pp. 501-502.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[725]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[726]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[727]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

2.4.8 Late formulation of a conditional interpretative declaration[728]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

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[725] For the commentary to this draft guideline, see *ibid.*, pp. 502-503.

[726] For the commentary to this draft guideline, see *ibid.*, pp. 503-505.

[727] For the commentary to this draft guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

[728] For the commentary to this draft guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

2.4.9 Modification of an interpretative declaration[729]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[730]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[731]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of withdrawal[732]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[733]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[734]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

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[729] For the commentary see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277.

[730] For the commentary see *ibid.*, pp. 277-278.

[731] For the commentary to this draft guideline, see *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

[732] For the commentary to this draft guideline, see *ibid.*, pp. 201-207.

[733] For the commentary to this draft guideline, see *ibid.*, pp. 207-209.

[734] For the commentary to this draft guideline, see *ibid.*, pp. 210-218.

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[735]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[736]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[737]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

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[735] For the commentary to this draft guideline, see *ibid.*, pp. 219-221.

[736] For the commentary to this draft guideline, see *ibid.*, pp. 221-226.

[737] For the commentary to this draft guideline, see *ibid.*, pp. 227-231.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[738]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses[739]

A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

B. Earlier effective date of withdrawal of a reservation[740]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[741]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[742]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

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[738] For the commentary to this draft guideline, see *ibid.*, pp. 231-239.

[739] For the commentary to this model clause, see *ibid.*, p. 240.

[740] For the commentary to this model clause, see *ibid.*, pp. 240-241.

[741] For the commentary to this model clause, see *ibid.*, pp. 241-242.

[742] For the commentary to this draft guideline, see *ibid.*, pp. 242-244.

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[743]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[744]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of an interpretative declaration[745]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.5.13 Withdrawal of a conditional interpretative declaration[746]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6.1 Definition of objections to reservations[747]

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

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[743] For the commentary to this draft guideline, see *ibid.*, pp. 244-256.

[744] For the commentary to this draft guideline, see *ibid.*, pp. 256-259.

[745] For the commentary to this draft guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 279-280.

[746] *Ibid.*, p. 280.

[747] For the commentary see *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186-202.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[748]

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

3. Validity of reservations and interpretative declarations

3.1 Permissible reservations[749]

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations expressly prohibited by the treaty[750]

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations[751]

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

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[748] For the commentary see *ibid.*, pp. 202-203.

[749] For the commentary see section C.2 below.

[750] For the commentary see section C.2 below.

[751] For the commentary see section C.2 below.

3.1.3 Permissibility of reservations not prohibited by the treaty[752]

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of specified reservations[753]

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its fifty-eighth session

159. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

3. Validity of reservations and interpretative declarations

General commentary

(1) The purpose of the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which deals with the procedure of formulation of reservations and interpretative declarations, is to determine the conditions for the validity of reservations to treaties.

(2) After extensive debate, the Commission decided, despite hesitation on the part of some members, to retain the term "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[754] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[755] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

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[752] For the commentary see section C.2 below.

[753] For the commentary see section C.2 below.

[754] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to draft guideline 3.1, paras. (6) and (7)); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[755] Or of the treaty as a whole with respect to certain specific aspects (see draft guideline 1.1.1).

(3) Adhering to the definition found in article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in draft guideline 1.1 of the Guide to Practice, the Commission accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, "[d]efining is not the same as regulating. [...] A reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[756] It went on to say: "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation (...) that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined."[757]

(4) This terminology poses a problem. At an early stage, the Commission opted for the words "permissibility" and "impermissibility" in preference to "validity" and "invalidity" or "non-validity" in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions but do not fulfil the conditions set forth in article 19.[758] Actually, the word "validity" seemed to a majority of the members of the Commission to be quite neutral in that regard. It offered the advantage that it did not prejudge the doctrinal controversy,[759] central to the question of reservations, between the proponents of "permissibility", who hold that "[t]he issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of

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[756] *Yearbook ... 1999*, vol. II, (Part Two), p. 126, para. (2) of the commentary; also see below the commentary to the draft guideline as amended at the fifty-eighth session of the Commission.

[757] *Ibid.*, p. 126, para. (3) of the commentary. See also the commentary to draft guideline 1.1.1 in *Yearbook ... 1998*, vol. II (Part Two), p. 101, para. (3) of the commentary, and the third report of the Special Rapporteur (A/CN.4/491/Add.3), paras. 158 and 179.

[758] See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, A/C.6/48/SR.24, para. 42.

[759] On this doctrinal dispute, see in particular Jean Kyongun Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23 (1982), pp. 71-116, *passim*, in particular pp. 75-77; see also Catherine Redgwell, "Universality or Integrity? Some reflections on reservations to general multilateral treaties", BYBIL, vol. 64 (1993), pp. 243-282, in particular pp. 263-269; and Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), p. 81, footnote 78.

whether as a matter of policy, other Parties find the reservations acceptable or not",[760] and the proponents of "opposability", who hold that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State" and who therefore view article 19, subparagraph (c), of the Vienna Convention of 1969 "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but not more than that".[761]

(5) Moreover, it was thought that the term "impermissible" ("*illicite*") was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. According to a majority of the members of the Commission, "in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose".[762] Consequently, the Commission, which in 2002 had decided to reserve its position on this matter pending an examination of the effect of such reservations,[763] thought that it would be better to settle that question of terminology without further delay.

(6) It appeared to the Commission:

- In the first place, that the term "permissible" ("*licite*") implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the responsibility of the reserving State or international organization, which was certainly not the case;[764] and

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[760] Derek W. Bowett, "Reservations to non-restricted multilateral treaties", BYBIL, vol. 48 (1976-1977), p. 88.

[761] José Maria Ruda, "Reservations to Treaties", *Recueil des cours* ..., vol. 146 (1975-III), p. 190.

[762] Commentary to draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 114, para. (7). According to a minority view, the formulation of an impermissible reservation would engage the responsibility of its author. The issue will be discussed in greater detail in the commentary to draft guideline 3.3.1.

[763] See the commentary on draft guideline 2.1.8, *ibid.*; see also draft guideline 2.1.7 (Functions of depositaries) and the commentary to it (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112).

[764] See para. (5) above.

- In the second place, that the term "permissible" used in the English text of the draft guidelines adopted to date and their commentaries implied that it was exclusively a question of permissibility and not of opposability, which had the disadvantage of unprofitably prejudging the doctrinal dispute discussed above.[765]

(7) However, the term "permissibility" was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. That term was rendered in French by the expression "*validité substantielle*".

(8) The third part of the Guide to Practice deals successively with the questions relating to:

- The permissibility of reservations;
- Competence to assess the validity of reservations; and
- The consequences of the invalidity of a reservation.

A special section will be devoted to the same questions in relation to interpretative declarations.

3.1 Permissible reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

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[765] Para. (4).

Commentary

(1) Draft guideline 3.1 faithfully reproduces the wording of article 19 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, which is patterned after the corresponding provision of the 1969 Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization may (...) formulate a reservation", albeit under certain conditions, that provision sets out "the general principle that the formulation of reservations is permitted ...".[766] This is an essential element of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[767] and it is no exaggeration to say that, on this point, it reverses the traditional presumption resulting from the system of unanimity,[768] the stated aim being to facilitate the widest possible participation in treaties and, ultimately, their universality.

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Waldock's proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only

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[766] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook ... 1962*, vol. II, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, p. 207, para. (17). For the 1986 Convention, see the commentary to draft articles 19 (Case of treaties between international organizations) adopted in 1977, *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (1), and 19 *bis* (Case of treaties between States and one or more international organizations or between international organizations and one or more States), *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (3).

[767] *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 28 May 1951, *I.C.J. Reports 1951*, p. 15.

[768] This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, appended to the advisory opinion, *I.C.J. Reports 1951*, pp. 34-35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on the draft article 18 adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report of Sir Humphrey Waldock on the law of treaties (A/CN.4/177 and Adds.1 and 2), *Yearbook ... 1965*, vol. II, p. 49).

be formulated (or "made")[769] if certain conditions were met.[770] Waldock,[771] on the other hand, presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[772]

(4) However, this power is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[773]

- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States - a situation that is taken into account in article 20, paragraph 2, of the Convention, which reverts to the system of unanimity where such instruments are concerned[774] - or, in the case of instruments of universal scope, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature, and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[775]

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[769] On this point, see paras. (6) and (7) below.

[770] See, for example, draft article 10, para. 1, proposed by J.L. Brierly (A/CN.4/23, *Yearbook ... 1950*, vol. II, p. 238), the drafts of article 9 proposed by Hersch Lauterpacht (first report (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91-92; and second report (A/CN.4/87), *Yearbook ... 1954*, vol. II, p. 131); or draft article 39, para. 1, proposed by G.G. Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 115). See the comments of Pierre-Henri Imbert in *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), pp. 88-89.

[771] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation ... unless: ..." (first report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 60, article 17, para. 1 (a)).

[772] Commentary to article 17, *ibid.*, p. 65, para. (9) - emphasis in the original.

[773] See para. (9) below.

[774] "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

[775] With regard to the residuary nature of the Vienna regime, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), pp. 124-126; John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", AJIL, vol. 74 (1980), pp. 383-391; P.-H. Imbert, *Les réserves aux traités ...*, *op. cit.*, pp. 162-230; Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp. 169-173;

(5) It is probably excessive to speak of a "right to reservations",[776] even though the Convention proceeds from the principle that there is a presumption in favour of their validity. Some members contested the existence of such a presumption. This, moreover, is the significance of the very title of article 19 of the Vienna Conventions ("Formulation of reservations"),[777] which is confirmed by its *chapeau*: "A State may (...) formulate a reservation unless ...". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right; but it is only the right to "formulate" reservations.[778]

(6) The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[779] this formulation is not sufficient of itself. The reservation is not "made", it does not produce any effect, merely by virtue of such a statement. For that reason an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[780] was rejected by the Drafting Committee of the Vienna Conference.[781] As Waldock noted, "there is an inherent ambiguity in

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Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg: Council of Europe, 1999), pp. 85-90 and 101-104; Rosa Riquelme Cortado, *Las reservas a los tratados - Formulación y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 89-136.

[776] Some members of the Commission, however, spoke in support of the existence of such a right.

[777] Concerning the modification of this title in the context of the Guide to Practice, see para. (10) below.

[778] P.-H. Imbert, *Les réserves aux traités ...*, *op. cit.*, p. 83; see also Paul Reuter, *Introduction au droit des traités*, 3rd ed., Philippe Cahier, ed. (Paris: PUF, 1995), p. 75; or R. Riquelme Cortado, *Las reservas a los tratados ...*, *op. cit.*, p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see footnote 18 above) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 133, para. 175). The current wording ("A State may ... formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid.*, vol. II, pp. 175-176, article 18, para. 1). No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[779] Cf. D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 22.

[780] A/CONF.39/C.1/L.161 (see *Documents of the Conference* (A/CONF.39/11/Add.2), *op. cit.*, p. 145, para. 177).

[781] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Committee of the Whole, 23rd meeting, 11 April 1968, p. 121, para. 2 (explanations

saying (...) that a State may "*make*" a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively "made" unless and until it has been assented to by the other interested States".[782] Now, not only is a reservation only "established"[783] if certain procedural conditions - admittedly, not very restrictive ones[784] - are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[785]

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since "*[l]orsque le traité autorise certaines réserves (article 19, alinéa b), elles n'ont pas besoin d'être acceptées par les autres États (...). Elles son donc 'faites' dès l'instant de leur formulation par l'État réservataire*" ["if the treaty permits specified reservations (article 19, subparagraph (b)), they do not need to be accepted by the other States ... They are thus 'made' from the moment of their formulation by the reserving State"].[786] Now, if subparagraph (b) meant to say that such reservations "may be *made*", the *chapeau* of article 19 would be misleading, for it implies that they, too, are merely "formulated" by their author.[787] But this is an empty argument;[788] subparagraph (b) is not about reservations that are established (or made)

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by China); and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

[782] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 71, para. (9) of the commentary to draft articles 17 to 19.

[783] See the *chapeau* of article 21: "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[784] See articles 20, paras. 3-5, 21, para. 1, and 23 and draft guidelines 2.1 to 2.2.3. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, vol. 15 (1985), at p. 28.

[785] "This article states the general principle that the *formulation* of reservations is permitted except in three cases" (emphasis added) (*Yearbook ... 1966*, vol. II, p. 207, commentary to art. 16, para. (17)); the use of the word "*faire*" in the French text of the commentary (ibid., p. 226) is open to criticism, but it is probably a translation error, rather than a deliberate choice - contra: P.-H. Imbert, *Les réserves aux traités ...*, op. cit. [illegible], p. 90. Moreover, the English text of the commentary is correct.

[786] P.-H. Imbert, *Les réserves aux traités ...*, op. cit., pp. 84-85.

[787] See also J.M. Ruda, "Reservations to Treaties" ..., op. cit., pp. 179-180, and the far more restrained criticism by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law (The Hague, 1988), vol. 5, pp. 111-112.

[788] One may, however, question the use of the verbs "formulate" and "make" in article 23, para. 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, "the reservation shall be considered as having been made on the date of its confirmation". In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by R. Riquelme Cortado, *Las reservas a los tratados ...*, op. cit., p. 85, appear to be based on a translation error in the Spanish text).

simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations may not be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

(8) Moreover, the principle of freedom to formulate reservations cannot be separated from the exceptions to the principle. For this reason, the Commission, which in general has avoided modifying the wording of the provisions of the Vienna Conventions that it has carried over into the Guide to Practice, decided against elaborating a separate draft guideline dealing only with the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of draft guideline 3.1 a reference to all the different moments (or "cases" or "instances", to reproduce the terminology used at various times in draft guideline 1.1.2),[789] "in which a reservation may be formulated". As discussed above,[790] article 19 reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions,[791] and this repetition is no doubt superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[792] However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966, and the repetition is not a sufficiently serious drawback to merit rewriting the Vienna Convention, which allowed this drawback to remain.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in the second part of the Guide to Practice, so that the third part places more emphasis on the substantive validity, that is, the permissibility of reservations - hence the title of "Permissible reservations" chosen by the Commission for draft guideline 3.1, for which it

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[789] See *Yearbook ... 1998*, vol. II (Part Two), p. 99.

[790] Para. (4).

[791] See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Cases in which a reservation may be formulated) and the commentary to them in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199 and 203-206.

[792] See the Fourth report of Humphrey Waldock (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 47.

was not possible to retain the title of article 19 of the Vienna Conventions ("Formulation of reservations"), already used for draft guideline 2.1.3.[793] In any case, it would tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

3.1.1 Reservations expressly prohibited by the treaty

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

Commentary

(1) According to Paul Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 (reproduced in draft guideline 3.1) constitute very simple cases.[794] However, this does not seem to be the case. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,[795] delicate problems can arise regarding the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Draft guideline 3.1.1 is intended to clarify the scope of subparagraph (a) of draft guideline 3.1, which does not indicate what is meant by "reservation prohibited by the treaty", while draft guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression "specified reservations" contained in subparagraph (b).

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[793] "Formulation of a reservation at the international level" (*Official Documents of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 68-75).

[794] Paul Reuter, "Solidarité et divisibilité des engagements conventionnels", *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (Dordrecht: Nijhoff, 1999), p. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international - Écrits de droit international* (Paris: Economica, 1999), p. 363).

[795] See footnote 800 and the commentary to draft guideline 3.1.3, para. (9), below.

(3) In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three situations:

- Reservations "prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization";
- Reservations not provided for by a clause that restricts the reservations that can be made; or
- Reservations not provided for by a clause that authorizes certain reservations.[796]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[797] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[798]

(4) Even though it was taken up again, in a slightly different form, by the Commission,[799] this categorization was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.[800] In draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he limited himself to distinguishing reservations prohibited by the terms of the treaty (or "by the established rules of an international organization")[801] from those implicitly prohibited as a result

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[796] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 60.

[797] Situation envisaged in para. 2 of draft article 17 but in a rather different form than in the current text.

[798] First report (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 74, para. (9) of the commentary.

[799] Draft article 18, para. 1 (b), (c) and (d), *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9* (A/5209), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary to this para., p. 180, para. (15)).

[800] On the contrary, during the discussion of the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded" (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); *contra*: Waldock, *ibid.*, p. 247, para. 32; as the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf (see the commentary to draft guideline 3.1.2, para. (6) above) indicates, this comment is highly relevant.

[801] Although the principle had not been disputed at the time of the debate in the plenary Commission in 1965 but had been disputed by Lachs in 1962 (see *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53).

of the authorization of specified reservations by the treaty.[802] This distinction is found in a more refined form[803] in article 19, subparagraphs (a) and (b), of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[804]

(5) According to Tomuschat, the prohibition in subparagraph (a), as it is drafted, should be understood as covering both express prohibitions and implicit prohibitions of reservations.[805] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

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and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, p. 174) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 195, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations and treaties adopted within an international organization appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see Maurice H. Mendelson, "Reservations to the constitutions of international organizations", BYBIL, vol. 45 (1971), pp. 137-171). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning *Reservations to the Convention on Genocide*, in *I.C.J. Reports 1951, Pleadings, Oral Arguments and Documents*, pp. 227-228, or the statement of Wilfred Jenks, Legal Adviser of the International Labour Organization, during the oral pleadings on that case, *ibid.*, p. 234); for a discussion and critique of this position, see the commentary to draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241, paras. (3)-(5).

[802] Fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 53.

[803] On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, pp. 163-173) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, p. 287, para. 1) and the debate on it (*ibid.*, pp. 287-289). The final texts of art. 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook ... 1966*, vol. II, p. 202), see also the commentary to draft guideline 3.1.2, footnote 838, below.

[804] The "alternative drafts" proposed *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all refer to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report (A/CN.4/63) *Yearbook ... 1953*, vol. II, pp. 115-116, *ibid.*, pp. 91-92).

[805] Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties. Comments on articles 16 and 17 of the International Law Commission's draft articles on the law of treaties", ZaöRV, vol. 27 (1967), p. 469.

- In the original wording, proposed by Waldock in 1962,[806] it was specified that the provision concerned reservations that were "prohibited by the terms of the treaty", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[807]

- In the commentary on draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[808]

(6) This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[809] Thus, apart from the case of reservations to the constituent instruments of international organizations - which will be covered by one or more specific draft guidelines - it is hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[810] of

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[806] See para. (3) above.

[807] See, however, the statement by Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19 "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...' For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" - but he was referring to the 1962 text.

[808] Like, moreover, "those expressly or impliedly authorized", *Yearbook ... 1966*, vol. II, p. 205, para. (10) of the commentary; see also p. 207, para. (17). In the same vein, article 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

[809] See para. (4) above. The Special Rapporteur indicated that, in drafting this clause, "what he had had in mind was the Charter of the United Nations, which, by its nature, was not open to reservations" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see footnote 801 above). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise - *ibid.*, 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, *ibid.*, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

[810] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary Committee (A/CONF.39/11/Add.1, p. 37). During the Commission's discussion of draft guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated

article 19,[811] and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the relative flexibility that pervades all the provisions of the Convention that deal with reservations.

(7) There is no problem - other than determining whether or not the declaration in question constitutes a reservation[812] - if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[813] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant."[814]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute."[815]

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in subparagraph (c) of article 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see article 20, para. 3, of the Vienna Conventions) provided sufficient guarantees.

[811] This is also the final conclusion arrived at by C. Tomuschat, "Admissibility and legal effects of reservations ...", *op. cit.*, p. 471.

[812] See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretive declarations) and its commentary, *Yearbook ... 1999*, vol. II (Part Two), pp. 107-109.

[813] Even in the area of human rights (see P.-H. Imbert, "Reservations and human rights conventions", *Human Rights Review* (1981), p. 28 or W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law* (1955), p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (cf. article 75 of the American Convention on Human Rights) - which conventions containing no reservation clauses do implicitly - or reproduce its provisions (cf. article 28, para. 2, of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, para. 2, of the 1989 Convention on the Rights of the Child).

[814] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see M. Mendelson, "Reservations to the Constitutions of international organizations", *op. cit.*, pp. 140 and 141).

[815] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute, which authorizes "a State on becoming a party [to] declare that, for a period of

And similarly, article 26, paragraph 1, of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention."[816]

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention ... declare that their respective countries do not intend to make any reservations to the Convention";[817] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties should, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses

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seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into force and amendment of the Statute" in Antonio Cassese, Paola Gaeta and John R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, whose art. 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Sia Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", *ICLQ*, vol. 48 (1999), pp. 493 and 494; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, *L.G.D.J.*, 7th edition (Paris, 2002), p. 181; P.-H. Imbert, *Les réserves aux traités ...*, *op. cit.*, pp. 165 and 166; F. Horn, *Reservations and Interpretative Declarations ...*, *op. cit.*, p. 113; R. Riquelme Cortado, *Las reservas a los tratados ...*, *op. cit.*, pp. 105-108; W.A. Schabas, "Reservations to human rights treaties ...", *op. cit.*, p. 46.

[816] For a very detailed commentary, see Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves (ed.), *Six Studies on Reservations*, *Comunicazioni e Studi*, vol. XXII, 2002, pp. 111-148; art. 26, para. 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of para. 1 and the declarations of para. 2 can prove laborious, but this is a problem of definition that does not in any way restrict the prohibition stated in para. 1: if a declaration made under para. 2 proves to be a reservation, it is prohibited. The combination of arts. 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit - Melanges offerts a Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Pedone, 2003), pp. 505-517; see also the commentary to draft guideline 3.1.2, footnote 840, below).

[817] Example given by P.-H. Imbert, *Les réserves aux traités ...*, *op. cit.*, pp. 166 and 167.

listing the provisions of the treaty to which reservations are not permitted.[818] Examples are article 42 of the Convention relating to the Status of Refugees of 28 July 1951[819] and article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

(10) The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article [illegible], paragraph 3, of the International Sugar Agreement of 1977:

> "Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement ...".

(11) The distinction between reservation clauses of this type and those excluding specific reservations was made in Sir Humphrey Waldock's draft in 1962.[820] For their part, the Vienna Conventions do not make such distinctions, and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that subparagraph (a) of article 19 covers all three situations that a more precise analysis can discern:

- Reservation clauses prohibiting all reservations;
- Reservation clauses prohibiting reservations to specified provisions;
- Lastly, reservation clauses prohibiting certain categories of reservations.

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[818] This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted - see the commentary to draft guideline 3.1.2, para. (5), below and the comments by Briggs (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962).

[819] With regard to this provision, P.-H. Imbert notes that the influence of the opinion (of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* adopted two months earlier) is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations (*Les réserves aux traités ...*, *op. cit.*, p. 167); see the other examples given, *ibid.*, or in the commentary to draft guidelines 3.1.2, paras. (5)-(8), below.

[820] See *Yearbook ... 1962*, vol. II, p. 60.

(12) This clarification seems all the more helpful in that the third of these situations poses problems (of interpretation)[821] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce expressly.[822] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19, subparagraph (a), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

Commentary

(1) A cursory reading of article 19, subparagraph (b), of the Vienna Conventions might suggest that it represents one side of the coin and subparagraph (a) represents the other. The symmetry is far from total, however. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case. Subparagraph (b) contains two additional elements which prevent oversimplification. The implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, depends on the fulfilment of three conditions:

(*a*) The treaty's reservation clause must permit the formulation of reservations;

(*b*) The reservations permitted must be "specified";

(*c*) It must be specified that "only" those reservations "may be made".[823]

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[821] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, *Modern Treaty Law and Practice*, *op. cit.*, p. 110).

[822] See the examples given in footnote 813 above. This is a particular example of "categories of prohibited reservations" - in a particularly vague way, it is true.

[823] On this word, see the commentary to draft guideline 3.1, paras. (6)-(7), above.

The purpose of draft guideline 3.1.2 is to clarify the meaning of the expression "specified reservations", which is not defined by the Vienna Conventions. This definition could, however, have important consequences for the applicable legal regime, as, among other things, reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.[824]

(2) The origin of article 19, subparagraph (b), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[825]

Waldock took up that concept again in paragraph 1 (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[826] and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (b), of the 1966 draft,[827] then into article 19 of the Convention. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting the provision[828] on the pretext that it was "too rigid"[829] or redundant because it duplicated subparagraph (a),[830] or that it had not been confirmed by practice;[831] all those amendments were, however, withdrawn or rejected.[832]

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[824] See draft guideline 3.1.4 below.

[825] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 115; see also p. 127, para. 95.

[826] See the commentary to draft guideline 3.1.1, paras. (3)-(4), above.

[827] See footnote 803 above.

[828] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), pp. 144 and 145, paras. 174-177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see *ibid.*, p. 151, para. 33; or Ruda, p. 154, para. 70).

[829] According to the representatives of the United States of America and Poland at the 21st meeting of the Plenary Committee (10 April 1968, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April to 22 May 1969*, Summary records of plenary meetings and meetings of the plenary

(3) The only change to subparagraph (b) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[833] This bland description must not obscure the vast practical implications of this specification, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.[834] This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[835] Such a reservation may also be subject to objections on other grounds. This is

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Committee (A/CONF.39/11), p. 117, para. 8, and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[830] Colombia, *ibid.*, p. 123, para. 68.

[831] Sweden, *ibid.*, p. 127, para. 29.

[832] See *ibid.*, pp. 148-149, paras. 181-188 and the explanations of the Expert Consultant, Sir Humphrey Waldock, *Summary records* (A/CONF.39/11), 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23-25.

[833] A/CONF.39/C.1/L.136; see *Summary records* (A/CONF.39/11), Plenary Committee, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18, subparagraph (b), as reviewed by the Drafting Committee, Castrén proposed inserting "only" after "authorizes" in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13); see also the similar proposal made by Yasseen, *ibid.*, para. 11, which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

[834] See F. Horn, *Reservations and Interpretative Declarations ..., op. cit.*, p. 114; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?*, T.M.C. Asser Institut (Dordrecht: Nijhoff, 1994), p. 39; Jean-Marie Ruda, "Reservations to Treaties", ... *op. cit.*, p. 181; or Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law* (1970), pp. 299-300. Such restrictive formulas are not unusual - see, for example, article 17, para. 1, of the Convention on the Reduction of Statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, *Las reservas a los tratados ..., op. cit.*, pp. 128-129. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook ... 1995*, vol. I, 2402nd meeting, p. 169, para. 17.

[835] See draft guideline 3.1.3 and commentary, in particular paras. (2)-(3), below.

why, in the wording of draft guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

(4) In practice, the types of clauses permitting reservations are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[836]

- Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;
- Others authorize specified categories of reservations;
- Lastly, others (few in number) authorize reservations in general.

(5) Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."[837]

As Ian Sinclair noted, "Article 12 of the 1958 Convention did not provide for specified reservations, even though it may have specified articles to which reservations might be made".[838]

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[836] See draft guideline 3.1.1 and commentary above.

[837] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, "Les reserves aux conventions sur le droit de la mer", *op. cit.*, pp. 505-511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing Parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see draft guidelines 1.4.6. and 1.4.7. of the Commission and the related commentary in the *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-252).

[838] Ian Sinclair, *The Vienna Convention* ..., *op. cit.*, p. 73. On the distinction between specified and non-specified reservations, see also paras. (11)-(13) below.

and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases[839] and, above all, by the arbitral award given in 1977 in the *Mer d'Iroise* case.[840]

(6) In that case, the Arbitral Tribunal emphasized that:

> "The clear terms of article 12 [of the 1958 Geneva Convention on the Continental Shelf] authorize any Contracting State, in particular the French Republic, to make its consent to be bound by the Convention conditional upon reservations to articles other than articles 1 to 3 inclusive."[841]

However,

> "Article 12 cannot be understood to compel States to accept in advance any kind of reservation to articles other than articles 1 to 3. Such an interpretation of article 12 would almost give contracting States the freedom to draft their own treaty, which would clearly go beyond the object of this article. Only if the article in question had authorized the formulation of specific reservations could it be understood that parties to the Convention had accepted in advance a specified reservation. But that is not the case here, because article 12 authorizes the formulation of reservations to articles other than articles 1 to 3 in very general terms".[842]

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

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[839] See judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 38-41.

[840] Award of 30 June 1977, UNRIAA, vol. XVIII, pp. 161-165, paras. 39-44.

[841] *Ibid.*, p. 161, para. 39.

[842] *Ibid.*

"1. In addition to the power given in the preceding article[[843]], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

"2. These reservations may be such as to exclude from the procedure described in the present Act:

"*(a)* Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;

"*(b)* Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

"*(c)* Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories."

As the International Court of Justice pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

> "When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty",

even when States do not "meticulously" follow the "pattern" set out in the reservation clause.[844]

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[843] Article 38 provides that Parties may accede to only parts of the General Act.

[844] Judgment of 19 December 1978, *I.C.J. Reports 1978*, p. 28, para. 55.

(8) Another particularly famous and widely discussed example[845] of a clause authorizing reservations (which falls under the second category mentioned above)[846] is found in article 57 (ex 64) of the European Convention on Human Rights:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> "2. Any reservation made under this article shall contain a brief statement of the law concerned."

In this instance, the power to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[847] a reservation to the Convention must:

- Refer to a particular provision of the Convention;

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[845] See Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari) (Bari, Levante, 1974), pp. 301-319; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme* (Paris: Economica, 1989), pp. 86-93; J.A. Frowein, "Reservations to the European Convention on Human Rights", *Protecting Human Rights: The European Dimension. Studies in Honour of Gerard J. Warda* (Cologne: C. Heymanns Verlag, 1988), pp. 193-200; Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case", ICLQ, vol. 33 (1984), pp. 558-595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", ZaöRV, vol. 42 (1982), pp. 58-92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, pp. 7-26; Maria Jose Morais Pires, *As reservas a Convenção europeia dos direitos do homen* (Coimbra, Portugal, Livraria Almedina, 1997), p. 493; Rosario Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, pp. 641-653 and William A. Schabas, "Article 64" in E. Decaux, P.-H. Imbert and L. Pettiti dirs., *La Convention européenne des droits de l'homme: commentaire article par article* (Paris: Economica, 1995), pp. 923-942.

[846] Para. (4). For other examples, see A. Aust, *Modern Treaty Law and Practice*, *op. cit.*, pp. 109-110; S. Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", ... *op. cit.*, pp. 495-496; William Bishop, Jr., "Reservations to treaties", *Recueil des Cours* ..., vol. 103, 1996-II, pp. 323 and 324 or P. Daillier and A. Pellet, *Droit international public*, *op. cit.*, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. (4) above, in C.R. Riquelme Cortado, *Las reservas a los tratados* ..., *op. cit.*, p. 125, and the other examples of partial authorizations given by this author, pp. 126-129.

[847] See the commentary to draft guideline 3.1, footnote 768, above.

- Be justified by the state of legislation [in the reserving State] at the time that the reservation is formulated;

- Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[848] and

- Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[849]

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are valid.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights is not fundamentally different[850] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

> "Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention",

even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[851]

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[848] *Belilos* case judgement of 29 April 1988, E.C.H.R. *Series A*, vol. 132, p. 25, para. 55.

[849] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[850] P.-H. Imbert, *Les réserves aux traités ...*, *op. cit.*, p. 186; see also R. Riquelme Cortado, *Las reservas a los tratados ...*, *op. cit.*, p. 122.

[851] Regarding this concept, see draft guideline 1.1.1 of the Commission's Guide to Practice and the commentary in *Yearbook ... 1999*, vol. II (Part Two), pp. 93-95.

(10) In fact, a general authorization of reservations[852] itself does not necessarily resolve all the problems. It leaves unanswered the question of whether the other Parties may still object to reservations[853] and whether these authorized reservations[854] are subject to the test of compatibility with the object and purpose of the treaty.[855] The latter question is addressed by draft guideline 3.1.4,[856] which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content relatively open.

(11) This distinction is not self-evident. It caused particular controversy following the 1977 arbitration award in the *Mer d'Iroise* case and divided the Commission, whose members advocated different positions. Some reserving States thought that a reservation was "specified" if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.[857] Others pointed out that that occurred very exceptionally, perhaps only in the rare case of "negotiated reservations",[858] and, furthermore, that the Commission had not retained Mr. Rosenne's proposal that the expression

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[852] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes of 1983: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[853] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women of 1952 and the related comments by R. Riquelme Cortado, *Las reservas a los tratados ..., op. cit.*, p. 121).

[854] It cannot be reasonably argued that subparagraph (b) could include "implicitly authorized" reservations - other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c).

[855] See the questions raised by S. Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", ... *op. cit.*, pp. 496-497, or R. Riquelme Cortado, *Las reservas a los tratados ..., op. cit.*, p. 124.

[856] For the commentary to draft guideline 3.1.4, see section C.2.

[857] Derek W. Bowett, "Reservations to non-restricted multilateral treaties", ... *op. cit.*, pp. 71-72.

[858] On this concept, see the commentaries to guideline 1.1.8 (Reservations made under exclusionary clauses) in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), p. 201, para. (11). See also W. Paul Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe", Part I, *Fordham Law Review*, vol. 39 (1970-1971), p. 59 at pp. 75 and 76. Cf. the annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation, or article 32, paragraph 1 (b), of the European Convention on Transfrontier Television of 1989, which exclusively grants the United Kingdom the ability to formulate a specified reservation; examples provided by Sia Spiliopoulo Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", ... *op. cit.*, p. 499. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" ("Reservations to non-restricted multilateral treaties", ... *op. cit.*, p. 71).

"specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions";[859] accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagraph (b) would be rendered meaningless.[860] According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a "reservation expressly authorized by the treaty",[861] even though articles 19, paragraph (b), and article 20, paragraph 1, use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (b) (and of draft guideline 3.1 (b)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined.[862]

(12) The case law was not very helpful in reconciling those opposing views. The arbitral award of 1977, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.[863] Indeed, the upshot of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[864] The Tribunal, however, confined itself to requiring reservations to be "specific",[865] without indicating what

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[859] *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire Français de Droit International*, 1978, p. 52, points out, however, that, even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*ibid.*, p. 265, para. 27).

[860] P.-H. Imbert, *ibid.*, pp. 50-53.

[861] In this connection, see P.-H. Imbert, *ibid.*, p. 53.

[862] See the Tenth report on reservations to treaties (A/CN.4/558), para. 49.

[863] See para. (6) above.

[864] See paras. (6)-(7) above.

[865] In reality, it is the authorization that must apply to specific or specified reservations - terms which the Tribunal considered to be synonymous, in the *Mer d'Iroise* case.

the test of that specificity was to be. In addition, during the Vienna Conference, K. Yasseen, Chairman of the Drafting Committee, assimilated specified reservations to those which were expressly authorized by the treaty[866] with no further clarification.

(13) Accordingly, most members of the Commission held that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take into account draft guideline 1.1.1 on "across-the-board reservations",[867] indicated that reservations were possible to the treaty as a whole in certain specific aspects. The divergence between these different points of view should not be overstated, however; while the term "envisaged" reservations, which was preferred to "authorized" reservations undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in draft guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the test of compatibility with the object and purpose of the treaty.

3.1.3 Permissibility of reservations not prohibited by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Draft guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (a) and (b), of the Vienna Conventions (the 1986 text of which is repeated in draft guideline 3.1). They make explicit what the Conventions leave implicit, *viz.*, that failing a contrary provision in the treaty - and in particular if the treaty authorizes specified reservations as defined in draft guideline 3.1.2 - any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty.

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[866] A/CONF.39/C.1/SR.70, para. 23.

[867] See *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[868] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[869] while avoiding the rigidity resulting from the system of unanimity.

(3) The notion of the object and purpose of the treaty,[870] which first appeared in connection with reservations in the advisory opinion of the International Court of Justice of 1951,[871] has become increasingly accepted. It is now the fulcrum between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty according to the 1951 advisory opinion, on the one hand, and article 19, subparagraph (c), of the Convention, on the other.[872] In the advisory opinion, the criterion applied equally to the formulation of reservations and to objections:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[873]

In the Convention, it is restricted to reservations: article 20 does not restrict the ability of other contracting States to formulate objections.

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[868] P. Reuter, *Introduction au droit des traités*, *op. cit.*, p. 73, para. 130. This author applies the term to the system adopted by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Genocide Convention* (*I.C.J. Reports 1951*, p. 15); the criticism applies perfectly well, however, to the pan-American system.

[869] On the pan-American system, see the bibliography in P.-H. Imbert, *Les réserves aux traités* ..., *op. cit.*, pp. 485-486. In addition, aside from the description by P.-H. Imbert himself (*ibid.*, pp. 33-38), see M.M. Whiteman, *Digest of International Law*, Department of State, Washington, D.C., 1970, vol. 14, pp. 141-144 or J.M. Ruda, "Reservations to Treaties", ... *op. cit.*, pp. 115-133.

[870] This notion will be defined in draft guideline 3.1.5.

[871] *I.C.J. Reports 1951*, pp. 24 and 26.

[872] V.M. Coccia, "Reservations to multilateral treaties on human rights", ... *op. cit.*, p. 9; L. Lijnzaad, *Reservations to UN Human Rights Treaties* ..., *op. cit.*, p. 40; Manuel Rama-Montaldo, "Human rights conventions and reservations to treaties", *Héctor Gros Espiell* Amicorum Liber, vol. II (Brussels, Bruylant, 1997), pp. 1265-1266; or I. Sinclair, The Vienna Convention ..., *op. cit.*, p. 61.

[873] *I.C.J. Reports 1951*, p. 24.

(4) While there is no doubt that this requirement that a reservation must be compatible with the object and purpose of the treaty now represents a rule of customary law which is unchallenged,[874] its content remains vague[875] and there is some uncertainty as to the consequences of incompatibility.[876] Moreover, article 19 does not dispel the ambiguity as to its scope of application.

(5) The principle set forth in article 19, subparagraph (c), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[877] and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[878]

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[874] See the many arguments to that effect given by C. Riquelme Cortado, *Las reservas a los tratados ..., op. cit.*, pp. 138-143. See also the Commission's 1997 preliminary conclusions, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations". *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. (1).

[875] See draft guidelines 3.1.5 to 3.1.13 proposed by the Special Rapporteur in his tenth report (A/CN.4/558/Add.1).

[876] See draft guidelines 3.3 to 3.3.4 proposed by the Special Rapporteur in his tenth report (A/CN.4/558/Add.1).

[877] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances of implicit prohibitions of formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[878] In its observations on the draft adopted on first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them." (Sir Humphrey Waldock, fourth report, A/CN.4/177, *Yearbook ... 1965*, vol. II, p. 48). That proposal, which was not very clear, was not retained by the Commission; cf. the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 246, paras. 13 and 14, and *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 288, para. 10; *contra*: Ago, *ibid.*, para. 16.

- The same applies to "specified" reservations that are expressly authorized by the treaty, with a defined content: they are automatically valid without having to be accepted by the other contracting States[879] and they are not subject to the test of compatibility with the object and purpose of the treaty.[880]

In the Commission's view, these obvious truths are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (c), of the Vienna Conventions, the text of which is repeated in draft guideline 3.1.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (a) and (b):

- Those in which a reservation is authorized because it does not fall under the category of prohibited reservations (subparagraph (a));

- Those in which a reservation is authorized without being "specified" within the meaning of subparagraph (b) as spelt out in draft guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would leave the treaty bereft of substance.

(9) On the subject of implicitly authorized reservations, Humphrey Waldock recognized, in his fourth report on the law of treaties, that "a conceivable exception [to the principle of automatic validity of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became

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[879] Cf. article 20, para. 1.

[880] See draft guideline 3.1.2 and commentary above.

article 19 of the Convention] as simple as possible".[881] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

(10) This is why draft guideline 3.1.3 stipulates that reservations which are "implicitly authorized" because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be allowed more liberally than in the case of treaties which contain no such clauses.[882] Thus the criterion of compatibility with the object and purpose of the treaty applies.

3.1.4 Permissibility of specified reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

Commentary

(1) Draft guideline 3.1.3 states that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Draft guideline 3.1.4 does likewise in the case of specified reservations in the sense of draft guideline 3.1.1 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of draft guideline 3.1.3 apply *mutatis mutandis*.

(2) The Polish amendment to subparagraph (b), adopted by the Vienna Conference in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided "that *only* specified reservations, which do not include the reservation in question, may be formulated".[883] But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations[884] apply here, and if one accepts the broad definition of specified reservations favoured by the majority of Commission members,[885] a

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[881] Report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 53, para. (4).

[882] In that vein, Rosenne in *Yearbook ... 1965*, vol. I, p. 164, 797th meeting, 8 June 1965, para. 10.

[883] See commentary to draft guideline 3.1.2, para. (3).

[884] See commentary to draft guideline 3.1.3, para. (9).

[885] See commentary to draft guideline 3.1.2, para. (13).

distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (c) of the 1969 Vienna Convention following the Polish amendment in fact goes in that direction. In the Commission's text, subparagraph (c) was drafted as follows:

> "(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty."[886]

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[887] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[888] The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

(4) That was, indeed, the reasoning followed by the arbitral tribunal which settled the *Mer d'Iroise* dispute in deciding that the mere fact that article 12 of the Geneva Convention on

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[886] *Yearbook ... 1966*, vol. II, p. 202.

[887] Poland had not, however, put forward any amendment to subparagraph (c), drawing the consequences from the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.125), *Documents of the Conference* (A/CONF.39/11/Add.2), p. 145, para. 177, was rejected by the plenary Commission (*ibid.*, p. 148, para. 181).

[888] Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). K. Yasseen merely stated that "certain members of the Committee considered that a treaty could conceivably contain provisions on reservations which did not come under any of the categories envisaged in subparagraphs (a) and (b)" (*Summary records* (A/CONF.39/11), plenary Commission, 70th meeting, 14 May 1968, p. 452, para. 17). Cf. a remark by Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 161, para. 37).

the Continental Shelf authorized certain reservations without specifying their content[889] did not necessarily mean that such reservations were automatically valid.[890]

(5) In such cases, the validity of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted".[891] Its validity must be assessed in the light of its compatibility with the object and purpose of the treaty.[892]

(6) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty.

1.6 Scope of definitions

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

Commentary

(1) This draft guideline was provisionally adopted by the Commission at its fiftieth session, in 1998, in a form which referred only to reservations. The related draft commentary indicated that its title and placement in the Guide to Practice would be determined at a later stage and that the Commission would consider the possibility of referring under a single caveat to both reservations and interpretative declarations, which, in the view of some members, posed identical problems.[893] At its fifty-first session, the plenary Commission adopted this approach, deeming it

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[889] See the commentary to draft guideline 3.1.2, para. (5).

[890] UNRIAA, vol. XVIII, p. 161, para. 39. See the commentary to draft guideline 3.1.2, para. (6).

[891] D. Bowett, "Reservations to non-restricted multilateral treaties", ... *op. cit.*, p. 72. In the same vein, J.M. Ruda, "Reservations to Treaties", ... *op. cit.*, p. 182; or Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, 1982, pp. 691-692. *Contra* P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 ...", *op. cit.*, pp. 50-53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the Vienna Conference (cf. above para. (3)).

[892] C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" ("Admissibility and legal effects of reservations to multilateral treaties ...", *op. cit.*, p. 474).

[893] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 213-214.

necessary to clarify and specify the scope of the entire set of draft guidelines relating to the definition of all unilateral statements which are envisaged, in order to make their particular object clear.

(2) As originally worded, draft guideline 1.6 read:

> "The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the *permissibility* and effects of such statements under the rules applicable to them."

At the fifty-seventh session, however, some members argued that the word "permissibility" was not appropriate: in international law, an internationally wrongful act entailed its author's responsibility,[894] and that was plainly not the case of the formulation of reservations that did not fulfil the conditions relating to form or substance that the Vienna Conventions imposed on reservations. At its fifty-eighth session, the Commission decided to replace "permissibility" by "validity", a term the majority of members considered more neutral. The commentary to draft guideline 1.6 was amended accordingly.[895]

(3) Defining is not the same as regulating. As "a precise statement of the essential nature of a thing",[896] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines but this does not necessarily mean that such statements are valid (or invalid) from the standpoint of other rules of

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[894] Cf. article 1 of the draft articles on Responsibility of States for internationally wrongful acts annexed to General Assembly resolution 56/83 of 12 December 2001.

[895] And the text of and commentary to draft guideline 2.1.8 likewise. For the original wording of the commentary, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 308-310.

[896] *The Oxford English Dictionary*, 2nd ed. (Oxford: The Clarendon Press, 1989).

international law. The same is true of interpretative declarations, which might conceivably not be valid either because they would alter the nature of the treaty or because they were not formulated at the required time,[897] etc.[898]

(4) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that it can be decided whether it is valid, that its legal scope can be evaluated and that its effect can be determined. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(5) For example, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily valid; its validity depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Similarly, the Commission's confirmation of the well-established practice of "across-the-board" reservations in draft guideline 1.1.1 [1.1.4] is in no way meant to constitute a decision on the validity of such a reservation in a specific case, which would depend on its contents and context; the sole purpose of the draft is to show that a unilateral statement of such a nature is indeed a reservation and as such subject to the legal regime governing reservations.

(6) The "rules applicable" referred to in draft guideline 1.6 are, first of all, the relevant rules in the 1969, 1978 and 1986 Vienna Conventions and, in general, the customary rules applicable to reservations and to interpretative declarations, which this Guide to Practice is intended to codify and develop progressively in accordance with the Commission's mandate, and those relating to other unilateral statements which States and international organizations may formulate in respect of treaties but which are not covered in the Guide to Practice.

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[897] This problem may very likely arise in connection with conditional interpretative declarations (see draft guideline 1.2.1).

[898] The same may obviously be said about unilateral statements which are neither reservations nor interpretative declarations, referred to in section 1.4.

(7) More generally, all the draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

2.1.8 [2.1.7 bis] Procedure in case of manifestly invalid reservations

Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

Commentary

(1) During the discussion of draft guideline 2.1.7, some members of the Commission considered that purely and simply applying the rules it established in the case of a reservation that was manifestly "invalid" gave rise to certain difficulties. In particular, they stressed that there was no reason to provide for a detailed examination of the formal validity of the reservation by the depositary, as the first paragraph of draft guideline 2.1.7 did, while precluding him from reacting in the case of a reservation that was manifestly impermissible from a substantive viewpoint (in particular, when the conditions specified in article 19 of the Vienna Conventions were not met).

(2) However, allowing him to intervene in the latter case would constitute a progressive development of international law, which, it had to be acknowledged, departed from the spirit in which the provisions of the Vienna Conventions on the functions of depositaries had been drawn up.[899] That is why, during its fifty-third session, the Commission considered it useful to consult member States in the Sixth Committee of the General Assembly about whether the depositary could or should "refuse to communicate to States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of a treaty".[900]

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[899] See the commentary to draft guideline 2.1.7, paras. (9) and (10).

[900] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 27-28, para. 25.

(3) The nuanced responses given to this question by the delegations to the Sixth Committee inspired the wording of draft guideline 2.1.8. Generally speaking, States expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof. Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and should therefore limit himself to transmitting to the parties the reservations that were formulated. However, a number of representatives to the Sixth Committee expressed the view that, when a reservation was manifestly not valid, it was incumbent upon the depositary to refuse to communicate it or at least to first inform the author of the reservation of his position and, if the author maintained the reservation, to communicate it and draw the attention of the other parties to the problem.

(4) Most members of the Commission supported this intermediate solution. They considered that it was not possible to allow any type of censure by the depositary, but that it would be inappropriate to oblige him to communicate the text of a manifestly invalid reservation to the contracting or signatory States and international organizations without previously having drawn the attention of the reserving State or international organization to the defects that, in his opinion, affected it. Nevertheless, it was to be understood that, if the author of the reservation maintained it, the normal procedure would resume and the reservation should be transmitted, with an indication of the nature of the legal problems in question. In point of fact, this amounts to bringing the procedure to be followed in the case of a reservation that is not manifestly valid in terms of substance into line with the procedure to be followed in the case of reservations that present problems of form. According to draft guideline 2.1.7, should there be a difference of opinion regarding such problems, the depositary "shall bring the question to the attention of: (a) [t]he signatory States and organizations and the contracting States and contracting organizations; or (b) [w]here appropriate, the competent organ of the international organization concerned".

(5) According to some members of the Commission, this procedure should be followed only if the "invalidity" invoked by the depositary is based on subparagraphs (a) and (b) of article 19 of the 1969 and 1986 Vienna Conventions (a reservation prohibited by the treaty, or not provided

for in a treaty that authorizes only certain specific reservations). Other members consider that the only real problem is that of the compatibility of the reservation with the object and purpose of the treaty (subparagraph (c) of article 19). The majority considered that this procedure applied to all the subparagraphs and therefore the Commission did not consider it justified to distinguish among the different types of invalidity listed in article 19.

(6) Similarly, despite the contrary opinion of some of its members, the Commission did not consider it useful to confine the exchange of opinions between the author of the reservation and the depositary implied by draft guideline 2.1.7 within strict time limits. The draft does not diverge from draft guideline 2.1.6 (ii), under which the depositary must act "as soon as possible". And, in any case, the reserving State or international organization must advise whether or not it is willing to discuss the matter with the depositary. If it is not, the procedure must follow its course and the reservation must be communicated to the other contracting parties or signatories.

(7) Although the Commission initially used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions,[901] some members pointed out that the word was not appropriate in that case: in international law, an internationally wrongful act entails its author's responsibility,[902] but this is plainly not the case with reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose or which do not respect the stipulations as to form or time limits laid down by the Vienna Conventions. At its fifty-eighth session, the Commission therefore decided to replace the words "permissible", "impermissible", "permissibility" and "impermissibility" by "valid", invalid", "validity" and "invalidity", and to amend this commentary accordingly.[903]

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[901] For the original version of draft guideline 2.1.8 and its commentary, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 112-114.

[902] Cf. draft article 1 of the draft articles on responsibility of States for internationally wrongful acts annexed to General Assembly resolution 56/83 of 12 December 2001.

[903] The text of and commentary to draft guideline 1.6 [1.4] have been similarly amended.

CHAPTER IX

UNILATERAL ACTS OF STATES

A. Introduction

160. In the report on the work of its forty-eighth session (1996), the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[904]

161. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

162. At its forty-ninth session (1997), the Commission established an open-ended Working Group on the topic which reported to the Commission on the admissibility and feasibility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[905]

163. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.[906]

164. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its work programme.

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[904] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and pp. 328-329.

[905] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 194 and paras. 196-210.

[906] *Ibid.*, paras. 212 and 234.

165. From its fiftieth session (1998) to its fifty-seventh session (2005), the Commission received and considered eight reports from the Special Rapporteur.[907]

166. The Commission also reconvened the Working Group on Unilateral Acts of States from its fiftieth session (1998) to its fifty-third session (2001) and from its fifty-fifth session (2003) to its fifty-seventh session (2005). The Working Group in its report at the fifty-sixth session (2004) established a grid which would permit it to use uniform analytical tools.[908] Individual members of the Working Group took up a number of studies, which were effected in accordance with the established grid. These studies were transmitted to the Special Rapporteur for the preparation of his eighth report. The Commission requested the Working Group at the fifty-seventh session (2005) to consider the points on which there was general agreement and which might form the basis for preliminary conclusions or proposals on the topic.

B. Consideration of the topic at the present session

167. At the present session, the Commission had before it the Special Rapporteur's ninth report (A/CN.4/569 and Add.1) which it considered at its 2886th, 2887th and 2888th meetings on 3, 4 and 5 July 2006.

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[907] *Yearbook ... 1998*, vol. II (Part Two), document A/CN.4/486 (first report); *ibid.* 1999, vol. II (Part Two), document A/CN.4/500 and Add.1 (second report); *ibid.*, 2000, vol. II (Part Two), document A/CN.4/505 (third report); A/CN.4/519 (fourth report); A/CN.4/525 and Add.1 and Corr.1 and Corr.2 and Add.2 (fifth report); A/CN.4/534 (sixth report); A/CN.4/542 and Corr.1 (French only) and Corr.2 and Corr.3 (seventh report) and A/CN.4/557 (eighth report).

[908] The Grid included the following elements: (a) Date; (b) Author/Organ; (c) Competence of author/organ; (d) Form; (e) Content; (f) Context and Circumstances; (g) Aim; (h) Addressees; (i) Reactions of Addressees; (j) Reactions of third parties; (k) Basis; (l) Implementation; (m) Modification; (n) Termination/Revocation; (o) Legal scope; (p) Decision of a judge or an arbitrator; (q) Comments; (r) Literature.

168. The ninth report of the Special Rapporteur comprised two parts. The first part related to the causes of invalidity,[909] and termination[910] of unilateral acts. The second part dealt with

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[909] **Principle 5**
Invalidity of an act formulated by a person not qualified to do so

A unilateral act formulated by a person not authorized or qualified to do so may be declared invalid, without prejudice to the possibility that the State from which the act was issued may confirm it in accordance with guiding principle 4.

Principle 6
Invalidity of a unilateral act that conflicts with a norm of fundamental importance to the domestic law of the State formulating it

A State that has formulated a unilateral act may not invoke as grounds for invalidity the fact that the act conflicts with its domestic law, unless it conflicts with a norm of fundamental importance to its domestic law and the contradiction is manifest.

Principle 7
Invalidity of unilateral acts

1. (a) A State that is the author of a unilateral act may not invoke error as grounds for declaring the act invalid, unless the act was formulated on the basis of an error of fact or a situation that was assumed by the State to exist at the time when the act was formulated and that fact or that situation formed an essential basis of its consent to be bound by the unilateral act.

(b) The foregoing shall not apply if the author State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of the possibility of such an error.

2. Fraud may be invoked as grounds for declaring a unilateral act invalid if the author State was induced to formulate the act by the fraudulent conduct of another State.

3. Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the act was formulated owing to the corruption of the person formulating it.

4. Coercion of the person who formulated a unilateral act may be invoked as grounds for declaring its invalidity if that person formulated it as a result of acts or threats directed against him or her.

5. Any unilateral act formulated as a result of the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations is invalid.

6. Any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid.

[910] **Principle 8**
Termination of unilateral acts

A unilateral act may be terminated or revoked by the formulating State:

(a) If a specific time limit for termination of the act was set at the time of its formulation (or if termination was implicit following the performance of one or more acts);

(b) If the act was subject to a resolutory condition at the time of its formulation;

(c) If the subject matter of the unilateral act has ceased to exist;

(d) If there has been a fundamental change in the circumstances that prompted the formulation of the act (*rebus sic stantibus*) which renders its fulfilment impossible;

(e) If a peremptory norm of international law has emerged following its formulation which conflicts with the act.

definition,[911] the capacity of a State to formulate a unilateral act,[912] the competence to formulate unilateral acts on behalf of the State,[913] the subsequent confirmation of an act formulated by a person without authorization,[914] the basis for the binding nature of the unilateral acts,[915] and the interpretation of unilateral acts.[916]

169. On 5 July 2006 the Commission decided to re-establish the open-ended Working Group under the chairmanship of Mr. Alain Pellet. The Working Group was requested to prepare

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[911] **Principle 1**
Definition of a unilateral act

A unilateral act of a State means a unilateral declaration formulated by a State with the intent of producing certain legal effects under international law.

Addressees of unilateral acts of States
Option A

A unilateral act may be addressed to one or more States, the international community as a whole, one or more international organizations or any other entity subject to international law.

Option B

A unilateral act formulated in accordance with international law will produce legal effects, regardless of whom it was addressed to.

[912] **Principle 2**
Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts in accordance with international law.

[913] **Principle 3**
Competence to formulate unilateral acts on behalf of the State

1. By virtue of their office, heads of State, heads of Government and ministers for foreign affairs are considered to represent their State and to have the capacity to formulate unilateral acts on its behalf.

2. In addition to the persons mentioned in the previous paragraph, other persons may be considered able to formulate unilateral acts on behalf of the State if that may be inferred from the practice followed in that regard by the formulating State and from the circumstances in which the act was formulated.

[914] **Principle 4**
Subsequent confirmation of an act formulated by a person without authorization (or not qualified to do so)

A unilateral act formulated by a person not authorized (or qualified) to act on behalf of the State, in accordance with the previous Guiding Principles, may be confirmed subsequently by the State either expressly or through conclusive acts from which such confirmation can be clearly inferred.

[915] **Principle 10**
Basis for the binding nature of unilateral acts

The binding nature of the unilateral acts of States is based on the principle of good faith and the intent to be bound of the State that formulated the act.

[916] **Principle 11**
Interpretation of unilateral acts

The context in which a unilateral act was formulated by a State, together with the clarity and precision of its terms, shall be given weight in interpreting it.

conclusions of the Commission on the topic "Unilateral Acts of States" taking into consideration the various views expressed, the draft Guiding Principles of the Special Rapporteur and its previous work on the topic.

170. The Commission, at its 2906th meeting on 4 August 2006 considered the report of the Working Group. Following its consideration of the report of the Working Group, the Commission adopted a set of 10 "Guiding Principles" together with commentaries applicable to unilateral declarations of States capable of creating legal obligations (section D below)[917] and commended the "Guiding Principles" to the attention of the General Assembly.

C. Tribute to the Special Rapporteur

171. At its 2913th meeting, on 11 August 2006, the Commission, after adopting the text of the Guiding Principles, adopted the following resolution by acclamation:

> "*The International Law Commission,*
>
> *Having adopted* the Principles relating to Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations and commentaries thereto,
>
> *Expresses* to the Special Rapporteur, Mr. Victor Rodríguez-Cedeño its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations through his tireless efforts and devoted work, and for the results achieved in the elaboration Principles."

172. The Commission also expressed its deep appreciation to the Working Group on Unilateral Acts under the chairmanship of Mr. Alain Pellet for its untiring efforts and contribution to the work on the topic.

D. Text of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations adopted by the Commission

Introductory note

173. Having examined the nine reports submitted by the Special Rapporteur and after extensive debates, the Commission believes it necessary to come to some conclusions on a topic,

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[917] *Nuclear Tests* case, Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 267, para. 43, and p. 472, para. 46.

the difficulties and the value of which have both become apparent. Clearly, it is important for States to be in a position to judge with reasonable certainty whether and to what extent their unilateral conduct may legally bind them on the international plane.

174. The Commission is aware, however, that the concept of a unilateral act is not uniform. On the one hand, certain unilateral acts are formulated in the framework and on the basis of an express authorization under international law,[918] whereas others are formulated by States in exercise of their freedom to act on the international plane; in accordance with the Commission's previous decisions, only the latter have been examined by the Commission and its Special Rapporteur.[919] On the other hand, in this second case, there exists a very wide spectrum of conduct covered by the designation "unilateral acts", and the differences among legal cultures partly account for the misunderstandings to which this topic has given rise as, for some, the concept of a juridical act necessarily implies an express manifestation of a will to be bound on the part of the author State, whereas for others any unilateral conduct by the State producing legal effects on the international plane may be categorized as a unilateral act.

175. As was decided at its fifty-sixth session (2004)[920] the Commission and its Special Rapporteur have accorded priority to the study of unilateral acts in the first of these senses, while bearing in mind that a State may be bound by conduct other than formal declarations.

1. Text of the Guiding Principles

176. The text of the Guiding Principles adopted by the Commission is reproduced below.

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations

The International Law Commission,

Noting that States may find themselves bound by their unilateral behaviour on the international plane,

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[918] Cf. the laws establishing the extent of the territorial sea or reservations to treaties, which are unilateral acts closely circumscribed by specific rules of international law.

[919] See *Yearbook ... 1997*, vol. II (Part Two), pp. 64-65, paras. 198-208.

[920] *Official Records of the General Assembly, Fifty-ninth Session, Supplement 10* (A/59/10), paras. 245-247. See also *ibid., Sixtieth Session, Supplement 10* (A/60/10), para. 293.

Noting that behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely,

Noting also that the question whether a unilateral behaviour by the State binds it in a given situation depends on the circumstances of the case,

Noting also that in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law,

Adopts the following Guiding Principles which relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law,

1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected;

2. Any State possesses capacity to undertake legal obligations through unilateral declarations;

3. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise;

4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence;

5. Unilateral declarations may be formulated orally or in writing;

6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities;

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated;

8. A unilateral declaration which is in conflict with a peremptory norm of general international law is void;

9. No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration;

10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

(i) Any specific terms of the declaration relating to revocation;

(ii) The extent to which those to whom the obligations are owed have relied on such obligations;

(iii) The extent to which there has been a fundamental change in the circumstances.

2. Text of the Guiding Principles with commentaries thereto adopted by the Commission at its fifty-eighth session

177. The text of the Guiding Principles together with commentaries[921] thereto adopted by the Commission at its fifty-eighth session is reproduced below.

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations

The International Law Commission,

Noting that States may find themselves bound by their unilateral behaviour on the international plane,

Noting that behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely,

Noting also that the question whether a unilateral behaviour by the State binds it in a given situation depends on the circumstances of the case,

Noting also that in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law,

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[921] These commentaries are explanatory notes reviewing the jurisprudence of the International Court of Justice and pertinent State practice analysed by several members of the Working Group and the Special Rapporteur and summarized in the eighth report of the Special Rapporteur (A/CN.4/557).

Adopts the following Guiding Principles which relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law,

1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.

Commentary

(1) The wording of Guiding Principle 1, which seeks both to define unilateral acts in the strict sense and to indicate what they are based on, is very directly inspired by the *dicta* in the Judgments handed down by the International Court of Justice on 20 December 1974 in the *Nuclear Tests* case.[922] In the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, the Court was careful to point out that "it all depends on the intention of the State in question".[923]

(2) Most of the cases studied illustrate this principle. Besides the declarations made by France in 1974 on the cessation of nuclear tests in the atmosphere, the public nature of the declaration made by Egypt on 24 April 1957 on the Suez Canal[924] and Jordan's waiver of claims to the West Bank territories[925] represent an important indication of their authors' intention to commit themselves. The Ihlen Declaration, made during a purely bilateral meeting between the Minister for Foreign Affairs of Denmark and the Norwegian ambassador to Copenhagen,[926] and the Colombian diplomatic note addressed solely to the Venezuelan authorities are not counter-examples: they relate only to bilateral relations between the two States concerned.[927]

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[922] *Nuclear Tests (Australia v. France; New Zealand v. France)*, Judgments dated 20 December 1974, *I.C.J. Reports 1974*, pp. 267-8, paras. 43 and 46 and pp. 472-3, paras. 46 and 49.

[923] *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, *I.C.J. Reports 1986*, p. 573, para. 39.

[924] Document A/CN.4/557, paras. 55-58; see also paras. 62 and 63.

[925] *Ibid.*, paras. 44-45.

[926] *Ibid.*, paras. 116-126; *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, *P.C.I.J., Series A/B, No. 53*, p. 71. It should, however, be pointed out that whether this declaration constituted a unilateral act is controversial (see A/CN.4/557, para. 122).

[927] See Guiding Principle 6 below.

2. Any State possesses capacity to undertake legal obligations through unilateral declarations.

Commentary

Just as "(e)very State possesses capacity to conclude treaties",[928] every State can commit itself through acts whereby it unilaterally undertakes legal obligations under the conditions indicated in these Guiding Principles. This capacity has been acknowledged by the International Court of Justice.[929]

3. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.

Commentary

(1) The wording of Guiding Principle 3 is also inspired by a passage in the ICJ Judgments in the *Nuclear Tests* cases;[930] allusion is made to this jurisprudence in the Judgments of 22 December 1986 in the *Frontier Dispute (Burkina Faso v. Republic of Mali)* case[931] and of 3 February 2006 in the *Armed Activities on the Territory of the Congo* case.[932] In the *Military and Paramilitary Activities in and against Nicaragua* and *Frontier Dispute* cases, the Court found nothing in the content of the declarations cited or the circumstances in which they were made "from which it [could] be inferred that any legal undertaking was intended to exist".[933]

(2) Generally speaking, the cases studied by the Commission confirm the relevance of this principle. In the Commission's view, it is particularly important to take account of the context

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[928] Vienna Convention on the Law of Treaties, 23 May 1969, article 6.

[929] See the jurisprudence cited in support of Guiding Principles 1 and 3.

[930] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, pp. 269-70, para. 51, and pp. 474-5, para. 53.

[931] *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986*, pp. 573-4, paras. 39-40.

[932] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application*, para. 49.

[933] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 132, para. 261, and *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986*, p. 573, para. 39.

and circumstances in which the declarations were made in the case of the Swiss statements concerning the privileges and immunities of United Nations staff,[934] the Egyptian declaration of 1957[935] and Jordan's waiver of claims to the West Bank territories.[936]

(3) Several of these examples show the importance of the reactions of other States concerned in evaluating the legal scope of the unilateral acts in question, whether those States take cognizance of commitments undertaken[937] (or, in some cases, rights asserted[938]), or, on the contrary, object to[939] or challenge the binding nature of the "commitments" at issue.[940]

4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.

Commentary

(1) Guiding Principle 4 is also inspired by the consistent jurisprudence of the P.C.I.J. and I.C.J., on unilateral acts and the capacity of State authorities to represent and commit the State internationally. In its recent Judgment on jurisdiction and admissibility in the case of *Armed Activities on the Territory of the Congo*, the International Court of Justice observed, referring to

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[934] A/CN.4/557, para. 157.

[935] *Ibid.*, paras. 58-60 or 66. See also, by analogy, in the case of conduct other than unilateral statements, the courses of conduct followed by Thailand and Cambodia in the *Temple of Preah Vihear* case (*ibid.*, paras. 160-167 and *Case concerning the Temple of Preah Vihea (Cambodia v. Thailand)* Judgment of 15 June 1962, *I.C.J. Reports 1962*, pp. 32-34).

[936] *Ibid.*, paras. 47-48.

[937] Cf. the international community's reactions to the Egyptian statement on the Suez Canal (*ibid.*, paras. 63-64); also the reactions to Jordan's statement about the West Bank (*ibid.*, paras. 48 and 50-51).

[938] Cf. the reactions of certain States to the Truman Proclamation (*ibid.*, paras. 132-134); also the note dated 22 November 1952 by the Venezuelan Government concerning the Los Monjes archipelago (*ibid.*, para. 17 - yet like the Ihlen Declaration (see footnote 926 above) this note was clearly a matter of bilateral negotiations with Colombia).

[939] See in particular Uruguay's refusal of a donation of vaccines from Cuba (*ibid.*, paras. 38-39) or the Russian protest at the law passed by Turkmenistan in 1993 on the delimitation of its internal and territorial waters in the Caspian Sea (*ibid.*, paras. 84-98).

[940] Cf. the reactions of the non-nuclear-weapon States to the statements made in April 1995 to the Conference on Disarmament by the permanent members of the Security Council (*ibid.*, paras. 113-115); their scepticism is, incidentally, vindicated by the content of those statements.

the similar customary rule in the law of treaties,[941] that "in accordance with its consistent jurisprudence (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports* 1974, pp. 269-270, paras. 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 53; see also *Legal Status of Eastern Greenland (Denmark v. Norway), Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71), it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State of unilateral acts having the force of international commitments".[942]

(2) State practice shows that unilateral declarations creating legal obligations for States are quite often made by heads of State or Government[943] or ministers for foreign affairs[944] without their capacity to commit the State being called into question. In the two examined cases in which problems relating to the extent of the speaker's authority arose both related to compliance with the domestic law of the State concerned.[945] The statement by the King of Jordan relating to the West Bank, which some considered to be *ultra vires* under the Constitution of the Kingdom,

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[941] Cf. article 7 of the 1969 Vienna Convention on the Law of Treaties.

[942] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, *Jurisdiction of the Court and Admissibility of the Application*, para. 46.

[943] See the statement made on 31 July 1988 by the King of Jordan waiving Jordan's claims to the West Bank territories (A/CN.4/557, para. 44), the Egyptian declaration of 24 April 1957 on the Suez Canal, made by the Egyptian Government (*ibid.*, para. 55), the statements of 8 June and 25 July 1974 and the letter of 1 July 1974 by the President of the French Republic (*ibid.*, para. 71) or the statement made on 28 September 1945 by President Truman of the United States concerning the continental shelf (*ibid.*, para. 127).

[944] See the note dated 22 November 1952 from the Colombian Minister for Foreign Affairs relating to Venezuelan sovereignty over the Los Monjes archipelago (*ibid.*, para. 13), the statement from the Minister for Foreign Affairs of Cuba about the supply of vaccines to Uruguay (*ibid.*, para. 36), the statement by the French Minister for Foreign Affairs to the United Nations General Assembly on 25 September 1974 about the cessation of nuclear tests in the atmosphere (*ibid.*, para. 71), the statements made, as representatives of nuclear-weapon States, by the Minister for Foreign Affairs of the Russian Federation and the United States Secretary of State to the United Nations Security Council (*ibid.*, para. 106), and the statement by Mr. Ihlen, the Minister for Foreign Affairs of Norway (*ibid.*, para. 116).

[945] See the case of the statement made by the Colombian Minister for Foreign Affairs on 22 November 1952 (*ibid.*, paras. 24-35) and the statement by the King of Jordan about the West Bank (*ibid.*, paras. 53-54).

was confirmed by subsequent domestic acts.[946] In the case of the declaration by the Colombian Minister for Foreign Affairs about Venezuelan sovereignty over the Los Monjes archipelago, the note itself was set aside in domestic law because its author had no authority to make such a commitment, yet the Colombian authorities did not challenge the validity of the commitment at the international level.[947]

(3) In its Judgment of 3 February 2006,[948] the I.C.J., did, however, note that "with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials".[949]

5. Unilateral declarations may be formulated orally or in writing.

Commentary

(1) It is generally accepted that the form of a unilateral declaration does not affect its validity or legal effects. The I.C.J. mentioned the relative unimportance of formalities[950] in its Judgment in the *Temple of Preah Vihear* case in connection with unilateral conduct.[951] In the *Nuclear Tests* cases, the Court emphasized that "[w]ith regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference,

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[946] *Ibid.*, para. 54.

[947] *Ibid.*, para. 35.

[948] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application*, para. 46.

[949] *Ibid.*, para. 47.

[950] See *The Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, *P.C.I.J., Series A, No. 2*, p. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgment of 11 July 1996, *I.C.J. Reports 1996*, p. 612, para. 24 and p. 613, para. 26.

[951] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections*, Judgment of 26 May 1961, *I.C.J. Reports 1961*, p. 31.

for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive".[952]

(2) State practice also shows the many different forms that unilateral declarations by States may take. The various declarations by France about the cessation of atmospheric nuclear tests took the form of a communiqué from the Office of the President of the Republic, a diplomatic note, a letter from the President of the Republic sent directly to those to whom the declaration was addressed, a statement made during a press conference and a speech to the General Assembly.[953] Other examples also go to show that, while written declarations prevail,[954] it is not unusual for States to commit themselves by simple oral statements.[955]

(3) France's statements on the suspension of atmospheric nuclear tests also show that a unilateral commitment by a State can come about through a series of declarations with the same general thrust, none of which might, in isolation, have bound the State. In its Judgments of 1974 on the *Nuclear Tests* cases, the I.C.J. did not concentrate on any particular declaration by the French authorities but took them, together, to constitute a whole: "[the] statements [by the President of the French Republic], and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form the statements were

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[952] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, pp. 267-268, para. 45, and p. 473, para. 48.

[953] Cf. Eighth report, A/CN.4/557, paras. 71 and 72.

[954] Consider the examples of the note dated 22 November 1952 from the Colombian Minister for Foreign Affairs (*ibid.*, para. 13), the Egyptian declaration of 24 April 1957 (*ibid.*, paras. 55 ff.), the protests by the Russian Federation against Turkmenistan and Azerbaijan (*ibid.*, paras. 85 and 99), the statements by the nuclear-weapon States (statements made before an international body, *ibid.*, paras. 106-107), the Truman Proclamation of 28 September 1945 (*ibid.*, para. 127) and the Swiss statements concerning the United Nations and its staff members (tax exemptions and privileges) (*ibid.*, paras. 140-142).

[955] See, for example, Jordan's waiver of its claims to the West Bank territories in a public speech, (*ibid.*, para. 44) or the Ihlen Declaration (*ibid.*, para. 117 - see *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, *P.C.I.J., Series A./B.*, No. 53, p. 71.

expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made".[956]

6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities.

Commentary

(1) Several of the cases examined remain within the scope of strictly bilateral relations between two States; accordingly these unilateral declarations by a State had another State as the sole addressee. Such was the case of the Colombian diplomatic note addressed to Venezuela,[957] the Cuban declarations concerning the supply of vaccines to Uruguay,[958] the protests by the Russian Federation against Turkmenistan and Azerbaijan[959] and the Ihlen Declaration.[960]

(2) Although initially concerning a limited group of States, other declarations were addressed to the international community as a whole, containing *erga omnes* undertakings. Thus, Egypt's declaration regarding the Suez Canal was not addressed only to the States parties to the Constantinople Convention or to the States members of the Suez Canal Users' Association, but to the entire international community.[961] Similarly, the Truman Proclamation,[962] and also the French declarations regarding suspension of nuclear tests in the atmosphere, although the latter were of more direct concern to Australia and New Zealand, as well as certain neighbouring States[963] were also made *erga omnes* and, accordingly, were addressed to the

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[956] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 269, para. 49, and p. 474, para. 51. See also the Swiss statements concerning the United Nations and its staff members (tax exemptions and privileges) A/CN.4/557, paras. 138-156).

[957] A/CN.4/557, paras. 15 and 16.

[958] *Ibid.*, para. 36.

[959] *Ibid.*, paras. 85 and 99.

[960] *Ibid.*, para. 117.

[961] *Ibid.*, para. 62.

[962] *Ibid.*, para. 127.

[963] Fiji filed an application to intervene in the proceedings. The Government of Argentina, Fiji and Peru requested that the pleadings and annexed documents should be made available to them. See *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 6, paras. 7 and 9.

international community in its entirety.[964] The same holds for the declaration by the King of Jordan of 31 July 1988, waiving Jordan's claims to the West Bank territories, which was addressed simultaneously to the international community, to another State (Israel) and to another entity the Palestine Liberation Organization (PLO).[965]

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.

Commentary

(1) In its Judgments in the *Nuclear Tests* cases, the International Court of Justice stressed that a unilateral declaration may have the effect of creating legal obligations for the State making the declaration only if it is stated in clear and specific terms.[966] This understanding has been adopted without change by the Court in the case concerning *Armed Activities on the Territory of the Congo*.[967]

(2) In case of doubt concerning the legal scope of the unilateral declaration, it must be interpreted in a restrictive manner, as clearly stated by the Court in its Judgments in the *Nuclear Tests* cases when it held that, "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for".[968] The interpreter must therefore proceed with great caution in determining the legal effects of unilateral declarations, in particular when the unilateral declaration has no specific addressee.[969]

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[964] *Ibid.*, p. 269, paras. 50 and 51 and p. 474, paras. 52 and 53.

[965] A/CN.4/557, para. 45. Other unilateral declarations are addressed to one or more international organizations, as is the case with Switzerland's declarations concerning the United Nations and its staff (tax exemptions and privileges) (*ibid.*, paras. 138 et seq.)

[966] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 267, para. 43, p. 269, para. 51, and p. 472, para. 46, p. 474, para. 53.

[967] *Armed Activities on the Territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, paras. 50 and 52.

[968] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 267, para. 44, and pp. 472 and 473, para. 47.

[969] *Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986*, p. 574, para. 39.

(3) With regard, in particular, to the method and means of the interpretation, attention is drawn to the observation by the International Court of Justice that "[t]he régime relating to the interpretation of declarations made under Article 36 of the Statute [[970]] is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties (...). Spain has suggested in its pleadings that '[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties'. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction".[971] Applying the Court's dictum and by analogy with article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, priority consideration must be given to the text of the unilateral declaration, which best reflects its author's intentions. In addition, as acknowledged by the Court in its Judgment in the *Frontier Dispute* case, "to assess the intentions of the author of a unilateral act, account must be taken of all the circumstances in which the act occurred",[972] which constitutes an application by analogy of article 31, paragraph 2, of the 1969 Vienna Convention.

8. A unilateral declaration which is in conflict with a peremptory norm of general international law is void.

Commentary

The invalidity of a unilateral act which is contrary to a peremptory norm of international law derives from the analogous rule contained in article 53 of the 1969 Vienna Convention on the Law of Treaties. Most members of the Commission agreed that there was no obstacle to the application of this rule to the case of unilateral declarations.[973] In its Judgment in the *Armed*

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[970] Declarations accepting the compulsory jurisdiction of the International Court of Justice made under Article 36 of the Statute of the Court lie outside the scope of the present study (see above, footnote 1). That said, the Court's reasoning is fully applicable to unilateral acts and declarations *stricto sensu*.

[971] *Fisheries Jurisdiction (Spain v. Canada), Merits*, Judgment of 4 December 1998, *I.C.J. Reports 1998*, p. 453, para. 46. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, Judgment of 11 June 1998, *I.C.J. Reports 1998*, p. 293, para. 30.

[972] *Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986*, p. 574, para. 40; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, para. 53, and *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 269, para. 51 and p. 474, para. 53.

[973] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 332, para. 557; *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), p. 203, para. 597.

Activities on the Territory of the Congo case, the Court did not exclude the possibility that a unilateral declaration by Rwanda[974] could be invalid in the event that it was in conflict with a norm of *jus cogens*, which proved, however, not to be the case.[975]

9. No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration.

Commentary

(1) It is well established in international law that obligations cannot be imposed by a State upon another State without its consent. For the law of treaties, this principle has been codified in article 34 of the 1969 Vienna Convention.[976] There is no reason why this principle should not also apply to unilateral declarations; the consequence is that a State cannot impose obligations on other States to which it has addressed a unilateral declaration unless the latter unequivocally accept these obligations resulting from that declaration.[977] In the circumstances, the State or States concerned are in fact bound by their own acceptance.

(2) The 1945 Truman Proclamation, by which the United States of America aimed to impose obligations on other States or, at least, to limit their rights on the American continental shelf, was not strictly speaking accepted by other States. All the same, as the Court has stressed, "this régime [of the continental shelf] furnishes an example of a legal theory derived from a particular source that has secured a general following".[978] In fact, the other States responded to the Truman Proclamation with analogous claims and declarations[979] and, shortly thereafter, the content of the Proclamation was taken up in article 2 of the 1958 Geneva Convention on the

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[974] The declaration in this case was a reservation, a unilateral act which lies outside the scope of the present Guiding Principles (see paragraph 174 above).

[975] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, para. 69.

[976] This article states: "A treaty does not create either obligations or rights for a third State without its consent." See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 21.

[977] Or if there was a general norm authorizing States to take such action; but the unilateral acts made pursuant to a norm of this kind lie outside the scope of the present Guiding Principles (see paragraph 174 above).

[978] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J Reports 1969*, p. 53, para. 100.

[979] See the case of Mexico, A/CN.4/557, para. 132.

Continental Shelf. It could therefore be said to have been generally accepted and it marked a point of departure for a customary process leading, in a very short time, to a new norm of international law. The International Court of Justice remarked in that context: "The Truman Proclamation however, soon came to be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated ... came to prevail over all others, being now reflected in article 2 of the 1958 Geneva Convention on the Continental Shelf."[980]

10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

(a) Any specific terms of the declaration relating to revocation;

(b) The extent to which those to whom the obligations are owed have relied on such obligations;

(c) The extent to which there has been a fundamental change in the circumstances.

Commentary

(1) In its 1974 Judgments in the *Nuclear Tests* cases, the International Court of Justice states that "the unilateral undertaking resulting from [the French] statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration".[981] This does not, however, exclude any power to terminate a unilateral act, only its arbitrary withdrawal (or amendment).

(2) There can be no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances. The Commission has drawn up an open-ended list of criteria to be taken into consideration when determining whether or not a withdrawal is arbitrary.

(3) A similar case obtains where the declaration itself stipulates the circumstances in which its author may terminate it[982] or when its addressees have relied on it in good faith and have

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[980] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J Reports 1969*, para. 47.

[981] *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 270, para. 51, and p. 475, para. 53.

[982] When the condition of the circumstances do not exist.

accordingly been led "detrimentally to change position or suffer some prejudice".[983] A unilateral declaration may also be rescinded following a fundamental change of circumstances within the meaning and within the strict limits of the customary rule enshrined in article 62 of the 1969 Vienna Convention on the Law of Treaties.[984]

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[983] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 1984*, p. 415, para. 51.

[984] *Fisheries jurisdiction (Germany v. Iceland), Jurisdiction of the Court, I.C.J. Reports 1973*, p. 63, para. 36, and *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports 1997*, p. 64, para. 104.

CHAPTER X

EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Introduction

178. The Commission, at its fifty-second session (2000), identified the topic "Effects of armed conflicts on treaties" for inclusion in its long-term programme of work.[985] A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[986] In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

179. During its fifty-sixth session, the Commission decided, at its 2830th meeting, on 6 August 2004, to include the topic "Effects of armed conflicts on treaties" in its current programme of work, and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic.[987] The General Assembly, in paragraph 5 of its resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

180. At its fifty-seventh session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/552) as well as a memorandum prepared by the Secretariat "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1). At its 2866th meeting, on 5 August 2005, the Commission endorsed the Special Rapporteur's suggestion that the Secretariat be requested to circulate a note to Governments requesting information about their practice with regard to this topic, in particular the more contemporary practice as well as any other relevant information.[988]

B. Consideration of the topic at the present session

181. At the present session, the Commission had the second report of the Special Rapporteur (A/CN.4/570 and Corr.1) before it. The Commission considered the Special Rapporteur's report at its 2895th to 2898th meetings, from 18 to 21 July 2006.

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[985] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

[986] *Ibid.*, annex.

[987] *Ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

[988] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 112.

1. General remarks on the topic

(a) Introduction by the Special Rapporteur

182. The Special Rapporteur observed that his second report, which had to be read together with his first report (A/CN.4/552), focused on two matters: (a) considering specific elements of the debate in the Commission and the substantial points made by various Governments in the debate in the Sixth Committee at the sixtieth session of the General Assembly; and (b) implementing the first report by asking the Commission to consider the first seven draft articles with a view to referring them to the Drafting Committee or to a working group.

183. The Special Rapporteur noted that general support had been expressed for his view that the topic was generally part of the law of treaties and not that on the use of force. He also recalled the views expressed in the Sixth Committee that the subject was closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility.

(b) Summary of the debate

184. It was reiterated that it was not possible to maintain a strict separation between the law of treaties and other branches of international law such as that of the rules relating to prohibition of use or threat of force in international relations, international humanitarian law and the law of responsibility of States for internationally wrongful acts, which were also of relevance to the topic.

(c) Special Rapporteur's concluding remarks

185. The Special Rapporteur was of the view that, given the nature of the debate in the Commission and the existence of substantial differences of opinion on important aspects of the subject, it would be premature to send the matter to a working group. In addition, a working group established in the first year of the new quinquennium of the Commission in 2007 would not necessarily be familiar with the debate on the topic during the present quinquennium. Accordingly, it was proposed that the best way forward would be for the Special Rapporteur to prepare a third report on the topic which could, together with the first two reports, form the basis for consideration by a working group in the future.

2. Article 1. Scope[989]

(a) Introduction by the Special Rapporteur

186. The Special Rapporteur pointed to the suggestion made in the Sixth Committee that, since article 25 of the Vienna Convention on the Law of Treaties[990] ("Vienna Convention of 1969") allowed for the provisional application of treaties, it seemed advisable that the draft articles also cover treaties that were being provisionally applied. He also noted that some members of the Commission had suggested that a distinction be made between contracting parties, under article 2, paragraph (1) (f), of the Vienna Convention of 1969, and those which are not.

(b) Summary of the debate

187. It was suggested that consideration be given to including within the scope of the topic the effect on the rights of third States parties to the treaty in question; the distinction between effects on different provisions of the treaty as opposed to on the entire treaty, as well as that between the effects on the treaty itself and those on the obligations arising from it; and the distinction between suspension and termination of the treaty or provisions thereof.

(c) Special Rapporteur's concluding remarks

188. The Special Rapporteur accepted that he would have to explore issues about the scope of the topic more thoroughly. Nonetheless, he cautioned against drawing a distinction between the effects on the treaty and those on the obligations arising from it which could upset the balance of

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[989] Draft article 1 reads as follows:

Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

[990] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. United Nations, *Treaty Series*, vol. 1155, p. 331.

the topic by entering into matters outside its traditional scope. He did not favour dealing with subjects like *force majeure* and supervening impossibility of performance, which risked replicating subjects already governed by the Vienna Convention of 1969.

3. Article 2. Use of terms[991]

(a) Introduction by the Special Rapporteur

189. As regards subparagraph (a), the Special Rapporteur observed that there was support for the inclusion of treaties concluded by international organizations.

190. He noted that the most problematic issue was the definition of armed conflict, in subparagraph (b), which had been examined in his first report. He observed that the distinction between international and non-international armed conflict was still considered to be basic in character and noted that the question provoked marked differences of opinion in the Sixth Committee. He requested that the Commission provide a general indication on the inclusion or not of non-international armed conflicts. At the same time, he cautioned that it would be inappropriate for it to seek to frame a definition of "armed conflict" for all departments of public international law.

(b) Summary of the debate

191. As regards subparagraph (a), while general support was expressed for the definition of "treaty", a preference was also expressed for including treaties entered into by international organizations. Others were of the view that international organizations were best not covered in light of their specificity. It was proposed that consideration also be given to treaties which had

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[991] Draft article 2 reads as follows:

Use of terms

For the purposes of the present draft articles:

(*a*) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(*b*) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

not yet entered into force or which had not yet been ratified by the parties to the armed conflict. In terms of another suggestion, the definition could be more flexible so as to cover agreements between an occupying power and an administration of the occupied territory, such as the regime based on *Oslo Accords*. Others preferred restricting the topic to agreements concluded within the framework of international law.

192. The definition of "armed conflict" in subparagraph (b) was the subject of criticism: reference was made to the inherent circularity in defining the concept as a "State of war or a conflict which involves armed operations". It was suggested that the definition expressly include internal armed conflicts which were more common in the contemporary world, and a preference was expressed for the definition employed in the *Tadić*[992] case, because it included internal conflicts where government armed forces were not involved.

193. In terms of a further view, internal conflicts do not affect relations between the States parties to the treaty directly, but may give rise to circumstances which affect the application of the treaty indirectly. These may include impossibility of performance or a change of circumstances and therefore lead to the suspension or termination of a treaty to which the State involved in the internal conflict is a party and the other States parties to the treaty are not involved, and, as such, were best analysed within the framework of the Vienna Convention of 1969.

194. Support was also expressed for the view of the Netherlands that military occupations also be included, as envisaged in article 18 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[993] and reference was also made to the Advisory Opinion of the International Court of Justice in the *Wall* case.[994] Others opposed this proposal, noting that military occupations should more properly be seen as a consequence of

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[992] *The Prosecutor v. Duško Tadić a/k/a "DULE", Decision*, Case No. IT-94-1, Appeals Chamber, 2 October 1995, para. 70.

[993] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 14 May 1954. United Nations, *Treaty Series*, vol. 249, p. 240.

[994] *Legal consequences of the construction of a wall in the occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 3.

armed conflict and not part of the definition of armed conflict itself. In terms of a further suggestion, it was necessary also to deal with territories under international administration. Others were of the view that such situations should not be considered as they did not constitute "armed conflict". In terms of another suggestion, it had to be considered whether conflicts of the "third kind", such as the "war on terrorism", should be dealt with - even if only to exclude such conflicts from the scope of the topic. Others cautioned against including the activities of non-State actors since such approach could threaten the stability of the treaty system.

195. It was reiterated that an aggressor State could not be placed on an equal footing with the State exercising its right to self-defence, whether individual or collective, in accordance with the Charter of the United Nations. Reference was made to the 1985 resolution of the Institute of International Law which had drawn such distinction. This opinion was shared by the majority of members of the Commission.

196. It was proposed that a third subparagraph be included defining the term "effects".

(c) Special Rapporteur's concluding remarks

197. As regards including international organizations, while he did not prefer bringing in material from other drafts by analogy, the Special Rapporteur acknowledged the practical point that it was not feasible to study the effects on treaties of international organizations as a separate topic, and therefore there was a case for dealing with such treaties in the present draft articles.

198. In response to comments on the definition of "armed conflict", the Special Rapporteur confirmed his willingness to refer to internal armed conflict. The concern he had related to the implication from some of the comments that what was called for was a global definition of armed conflict, whereas the purpose of subparagraph (a) was to provide a definition solely for the purposes of the draft articles. To his mind, the concept of the inclusion of internal armed conflicts was governed by the intention of the parties in draft article 4. One of the criteria for discerning the intention of the parties was the nature and scope of the conflict in question. As to the illegal use of force, he reiterated his position from the previous year that draft article 10 would be carefully redrafted.

4. Article 3. *Ipso facto* termination or suspension[995]

(a) Introduction by the Special Rapporteur

199. The Special Rapporteur noted that draft article 3 was the primary article because it was based on the central proposition that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. He noted that it was not strictly necessary, in the sense that draft article 4 could stand without it. Nonetheless it was useful to rebut the historical view that armed conflict, in effect, set treaties aside. He recalled that the phrase "*ipso facto*" would be replaced by "necessarily".

(b) Summary of the debate

200. General support was expressed for the retention of draft article 3 which was considered central to the draft articles. Support was also expressed for the Special Rapporteur's proposal to replace the phrase "*ipso facto*" with "necessarily", which would serve as an indication that in some cases armed conflict did lead to the suspension or termination of treaties, but in orders it would not, i.e. different effects were possible for different treaties. Others opposed the proposed drafting change and preferred to retain the expression "*ipso facto*" to indicate that outbreak of an armed conflict does not have an automatic effect on terminating or suspending a treaty.

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[995] Draft article 3 reads as follows:

Ipso facto termination or suspension

The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:

(*a*) Between the parties to the armed conflict;

(*b*) Between one or more parties to the armed conflict and a third State.

5. Article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict[996]

(a) Introduction by the Special Rapporteur

201. The Special Rapporteur pointed to the reliance on the concept of the intention of the parties, which had been the subject of strong scepticism. While he shared such scepticism, he was of the view that it was the only workable concept available. He noted that it was not infrequent that decision-makers and tribunals have had to construct the intention of the parties. At the same time, he recognized that it was necessary to include other factors, such as the object and purpose of the treaty and the circumstances of the armed conflict.

202. There remained the question of the relationship between draft articles 4 and 7. It was his intention that the two provisions would be applicable on a basis of coordination. In addition, draft article 4 referred to articles 31 and 32 of the Vienna Convention of 1969, which was necessary since there could be no question of fashioning "designer" principles of interpretation for exclusive use in the present context.

(b) Summary of the debate

203. The view was expressed that the criterion of intention had lost its significance after the second world war, apart from some specific treaties, given the strengthening of the principle of the prohibition of recourse to armed force in international relations. In addition, agreement was expressed with the view that it was not realistic to think that parties contemplate the effect of an

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[996] Draft article 4 reads as follows:

The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(*a*) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(*b*) The nature and extent of the armed conflict in question.

armed conflict on a treaty at the time of its conclusion. A preference was expressed for considering the viability of the continuance of the treaty, or one of its provisions, in the context of armed conflicts, as well as the legality of the actions of each of the parties to the conflict. Several members also referred to the criteria of the object and purpose of the treaty, the nature of the conflict or the situation that arises therefrom and the nature of the treaty obligation itself. It was also pointed out that it was necessary to take into account the subsequent history of the treaty as contemplated in articles 31 and 32 of the Vienna Convention of 1969.

(c) Special Rapporteur's concluding remarks

204. The Special Rapporteur confirmed that he intended to pursue the question of intention further. At the same time, he could not accept that intention was no longer a part of international law. It was quite common to see references to the intention of the parties or of the legislator. Indeed, the Commission itself was employing the concept in the context of the topic reservations to treaties. Instead, the problem was the ascertainment of evidence of intention.

6. Article 5. Express provisions on the operation of treaties[997]

(a) Introduction by the Special Rapporteur

205. The Special Rapporteur remarked that the draft article was redundant on a strict view of drafting. However, he felt it helpful to have such a provision for the sake of clarity, and he noted that the Commission had expressed general support for it.

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[997] Draft article 5 reads as follows:

Express provisions on the operation of treaties

1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

(b) Summary of the debate

206. It was suggested that the two paragraphs could be dealt with in separate draft articles. It was also proposed that paragraph 1 be replaced with the version proposed in article 35, paragraph (a), of the Harvard Research Draft.[998] Reference was made to the Advisory Opinion of the International Court of Justice in the *Wall* case, where the Court confirmed that human rights treaties were not excluded as a result of the operation of *lex specialis*.

7. Article 6. Treaties relating to the occasion for resort to armed conflict[999]

(a) Introduction by the Special Rapporteur

207. The Special Rapporteur confirmed that he no longer supported draft article 6 since it was not strictly necessary in light of draft article 3. It was an attempt to deal with the special case where an agreement had been the subject of conflict and then there was some procedure of peaceful settlement that ensued.

(b) Summary of the debate

208. General support was expressed for the Special Rapporteur's proposal to delete the provision.

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[998] Reproduced in A/CN.4/552, para. 55.

[999] Draft article 6 reads as follows:

Treaties relating to the occasion for resort to armed conflict

> A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the contracting parties.

8. Article 7. The operation of treaties on the basis of necessary implication from their object and purpose[1000]

(a) Introduction by the Special Rapporteur

209. The Special Rapporteur noted that the provision was complementary to draft article 4. It was also the main source of debate and comment by Governments. There were some convincing arguments, such as that by the United States of America, that it was a mistaken approach to resort to the categorization of treaties. He noted some other suggestions to take into account possible Guiding Principles or policy elements in the discernment of the element of intention. Yet, it had to be recognized that there was customary law, or nascent customary law, supporting some if not all of the categories, and an appropriate vehicle had to be found to reflect such practice. A possible approach was to include an annex containing an analysis of the State practice and case law, which could be prepared by the Secretariat with assistance from the Special Rapporteur.

[1000] Draft article 7 reads as follows:

The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(*a*) Treaties expressly applicable in case of an armed conflict;

(*b*) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(*c*) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(*d*) Treaties for the protection of human rights;

(*e*) Treaties relating to the protection of the environment;

(*f*) Treaties relating to international watercourses and related installations and facilities;

(*g*) Multilateral law-making treaties;

(*h*) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(*i*) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(*j*) Treaties relating to diplomatic relations;

(*k*) Treaties relating to consular relations.

(b) Summary of the debate

210. Different views were expressed on draft article 7. For some, the provision was useful but needed to be clarified. Reference was made to the memorandum prepared by the Secretariat (A/CN.4/550) by way of suggestions for the expansion of the list. In addition, it was suggested that certain categories of treaties had to be listed in a more precise manner, e.g. multilateral law-making treaties. Support was expressed for the current inclusion of human rights treaties (para. 2 (d)). Others supported the proposal to delete the provision. It was pointed out that any list of examples of types of treaties created an *a contrario* presumption that treaties not covered by those categories would automatically lapse, which could amount to a potentially large, even if unintended, exception to the general rule in draft article 3. Support was expressed for the Special Rapporteur's proposal to replace the list with an annex containing State practice and jurisprudence. Still others considered it more useful to enumerate the factors which might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict.

(c) Special Rapporteur's concluding remarks

211. The Special Rapporteur recalled that the list of categories in draft article 7 was only meant to provide guidance for the discovery of intention in draft article 4, and reiterated that he was prepared to revisit the provision.

CHAPTER XI

THE OBLIGATION TO EXTRADITE OR PROSECUTE
(*AUT DEDERE AUT JUDICARE*)

A. Introduction

212. The Commission, at its fifty-sixth session (2004), identified the topic "the Obligation to extradite or prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work.[1001] A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission.[1002] The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission's report concerning its long-term programme of work.

213. During its fifty-seventh session, the Commission decided, at its 2865th meeting, on 4 August 2005, to include the topic "the Obligation to extradite or prosecute (*aut dedere aut judicare*)" in its current programme of work, and to appoint Mr. Zdzislaw Galicki as Special Rapporteur for the topic.[1003] The General Assembly, in paragraph 5 of its resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

214. At the present session, the Commission had the preliminary report of the Special Rapporteur (A/CN.4/571) before it. The Commission considered the report at its 2899th to 2903rd meetings, from 25 July to 2 August 2006.

1. Introduction by the Special Rapporteur

215. The Special Rapporteur observed that his report contained a preliminary set of observations concerning the substance of the topic, marking the most important points for

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[1001] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362-363.

[1002] *Ibid.*, annex.

[1003] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 500.

further consideration and including a preliminary plan of action for the future work on the topic. While it was premature to take a decision, it was useful to receive an indication from the Commission as to the possible final form of the work on the topic.

216. A key question to be considered was whether the obligation derived exclusively from the relevant treaty or whether it also reflected a general obligation under customary international law, at least with respect to specific international offences. He noted that there was no consensus in the doctrine, although a growing number of scholars supported the concept of an international legal obligation "*aut dedere aut judicare*" as a general duty based not only on the provisions of particular international treaties, but also on generally binding customary norms, at least as it concerned certain categories of crimes. In addition, it was suggested that an analysis of the link between the principle of universal jurisdiction in criminal matters and the principle *aut dedere aut judicare* should be undertaken.

217. As regards the scope of the obligation to extradite or prosecute, the Special Rapporteur noted that it was constructed in the alternative giving a State the choice to decide which part of the obligation it was going to fulfil. It was presumed that after fulfilling a part of the obligation - either *dedere* or *judicare* - the State was released from fulfilling the other part.

218. The Special Rapporteur recalled that, while the obligation to extradite or prosecute was traditionally formulated in the alternative, there was the possibility of a "triple alternative", which contemplated the existence of a jurisdictional competence to be exercised by an international criminal tribunal.

219. As regards methodology, the Special Rapporteur stated his intention to proceed in future reports to formulate draft rules concerning the concept, structure and operation of the obligation *aut dedere aut judicare*. It was also necessary to undertake a thorough analysis of the practice of States in the area, and to compile a complete list of relevant treaty provisions reflecting the obligation. He proposed that the Commission could address a written request to member States for information concerning their contemporary practice.

2. Summary of the debate

220. The Commission welcomed the preliminary report, including the proposed preliminary plan of action. It was suggested that the scope of the topic should be limited to the objective of the obligation, namely to reduce cases of impunity for persons suspected of having committed international crimes by depriving them of "safe havens". It was proposed that the topic could be further limited to particular categories of crimes, such as those which were particularly grave and threatened the international community as a whole. It was also suggested that a distinction be drawn between crimes under international law (defined in treaty instruments), and crimes recognized under international customary law, such as war crimes, genocide and crimes against humanity. There was general support for excluding crimes that were solely foreseen under national laws from the scope of the study.

221. In addition, it was observed that a more limited form of the obligation existed in regard to treaty crimes. For example, it was noted that many treaties, including the sectoral conventions for the suppression of international terrorism, contained a more guarded formulation, namely to submit the case to the competent authorities "for the purpose of prosecution", as opposed to an obligation "to prosecute". It was recalled that Governments typically resisted accepting an obligation "to prosecute" since the independence of prosecution was a cardinal principle in their national criminal procedures.

222. It was suggested that the Commission focus on gaps in existing treaties, such as the execution of penalties and the lack of a monitoring system with regard to compliance with the obligation to prosecute. As regards the question of the existence of a customary obligation to extradite or prosecute, it was suggested that any such obligation would have to be based on a two-tier system as in existing treaties, whereby certain States were given priority jurisdiction and other States would be obliged to exercise jurisdiction if the alleged offender was not extradited to a State having that priority jurisdiction.

223. Concerning the obligation to extradite, it was pointed out that whether such obligation existed depended on the treaties existing between the parties and on the circumstances. In addition, since crimes were typically defined very precisely in domestic laws, the question had

to be whether there was an obligation to extradite or prosecute for a precisely defined crime in precisely defined circumstances. It was also noted that most of the complex issues in extradition were solved pragmatically. Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned. In terms of a further view, the procedure of deportation was relevant to the topic.

224. It was proposed that the Commission could consider the practical difficulties encountered in the process of extradition, including: problems of the sufficiency of evidence, the existence of outdated bilateral and multilateral treaties and national laws allowing multiple grounds for refusal, limitations on the extradition of nationals and the failure to recognize specific safeguards for the protection of the rights of the extradited individual, particularly in situations where extradition could expose the individual to torture, the death penalty, or even life imprisonment. It was also recalled that in the situation of international crimes some of the limitations on extradition were inapplicable.

225. Others cautioned against considering the technical aspects of extradition law. What was specific to the topic and the precise meaning of the Latin maxim "*aut dedere aut judicare*" was that, failing an extradition, an obligation to prosecute arose. The focus, therefore, should be on the conditions for triggering the obligation to prosecute. The view was expressed that the Commission should not deal with all the collateral rules on the subject, which were linked to it but not necessarily part of it. It was also proposed that the focus should be limited to the elaboration of secondary rules.

226. A general preference was expressed for drawing a clear distinction between the concepts of the obligation to extradite or prosecute and that of universal criminal jurisdiction. It was recalled that the Commission had decided to focus on the former and not the latter, even if for some crimes the two concepts existed simultaneously. It was pointed out that the topic did not necessarily require a study in extraterritorial criminal jurisdiction. If the Commission were, nonetheless, to embark on a consideration of the concept of universal jurisdiction, it was suggested that the different kinds of universal jurisdiction, particularly whether it was permissive or compulsory, be considered. It was also considered worth contemplating whether such

jurisdiction could only be exercised when the person was present in a particular State or whether any State could request the extradition of a person from another State on grounds of universal jurisdiction.

227. It was also suggested that the topic not include the "triple" alternative, involving the concurrent jurisdiction of an international tribunal, since the existing tribunals had their own *lex specialis* rules. According to another opinion, it would be necessary insofar as possible to favour that third path.

228. It was suggested that the Special Rapporteur undertake a systematic study of State practice, focusing on contemporary practice, including national jurisprudence.

229. On the question of the final form, while it was recognized that it was premature to consider the matter, a preference was expressed for the eventual formulation of a set of draft articles; although it was noted that if the Commission were to conclude that the obligation existed only under international treaties, then a draft of a recommendatory nature would be more appropriate.

3. Special Rapporteur's concluding remarks

230. The Special Rapporteur noted that a range of views had been expressed during the debate. In particular, he referred to the general consensus in the Commission that the scope of the topic be limited as far as possible so as to concentrate on the issues directly connected with the obligation to extradite or prosecute, as well as on an analysis of the principal elements of the obligation, i.e. "*dedere*" and "*judicare*". He supported such approach especially with regard to drawing a clear distinction between the obligation to extradite or prosecute and the principle of universal jurisdiction; and taking a cautious approach to the existence of a "triple alternative" in the context of the jurisdiction of international criminal tribunals.

231. With regard to the issue of limiting the source of the obligation only to treaties, or extending it to customary norms or general principles of law, the Special Rapporteur noted that the Commission had opted for a cautious approach: recognizing the treaty basis of the obligation while expressing some reservations about the existence of a general customary obligation to extradite or prosecute applicable to all offences under criminal law. Support existed instead for recognizing such customary basis in the context of certain categories of crimes in the context of

which the concept of universal jurisdiction, as well as the principle *aut dedere aut judicare*, had already received general recognition among States. The Special Rapporteur expressed support for such approach, although without prejudice to the possibility of developing general rules applicable to all crimes. He further recalled the suggestions that special attention be given to the applicability of international human rights law. Furthermore he agreed with the suggestion that the focus of the whole exercise be on the elaboration of secondary rules. The Special Rapporteur also agreed with the recommendation that both international and national judicial decisions should be considered.

232. As regards the title of the topic, he recalled the references in the debate to the "principle" of *aut dedere aut judicare*, but expressed a preference for retaining the existing reference to "obligation". As to the eventual form of the Commission's work on the topic, the Special Rapporteur noted that preliminary support existed for the formulation of draft articles. Accordingly, he announced his intention to proceed in future reports with the formulation of draft rules on the concept, structure and operation of the obligation *aut dedere aut judicare*.

CHAPTER XII

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

233. The Commission, at its fifty-fourth session (2002), decided to include the topic "Risks ensuing from fragmentation of international law" in its programme of work;[1004] it established a Study Group and subsequently decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[1005] The Commission also agreed on a number of recommendations, including on five studies to be undertaken,[1006] commencing with a study by the Chairman of the Study Group on the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

234. From the fifty-fifth (2003) to the fifty-seventh (2005) sessions of the Commission, the Study Group was successively reconstituted under the chairmanship of Mr. Martti Koskenniemi and carried out several tasks. In 2003, it set a tentative schedule for work to be carried out for the remainder of the quinquennium (2003-2006), distributed among its members work on the other studies agreed upon in 2002, and decided upon the methodology to be adopted for that work.[1007] In 2004, the Study Group held discussions on the study by its Chairman on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'", as well as discussions on the outlines prepared in respect of the other remaining studies.[1008]

[1004] The topic was included on the Commission's long-term of work at its fifty-second session (2000) following its consideration of a feasibility study, G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Ibid., Fifty-fifth Session*, Supplement No. 10 (A/55/10), annex and para. 729.

[1005] *Ibid., Fifty-seventh Session*, Supplement No. 10 (A/57/10), paras. 492-494.

[1006] (a) "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'"; (b) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (e) hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

[1007] *Official Records of the General Assembly, Fifty-eighth Session*, Supplement No. 10 (A/58/10), paras. 415-435.

[1008] *Ibid., Fifty-ninth Session*, Supplement No. 10 (A/59/10), paras. 303-358.

In 2005, the Study Group held discussions on (a) a memorandum on regionalism in the context of the study on "the function and scope of the *lex specialis* rule and the question of self-contained regimes"; (b) a study on the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) a study on the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties); (d) a study on the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties); and (e) a study on hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules. It also held discussion on an informal paper on the "Disconnection Clause".[1009]

235. The Study Group decided to approach the various studies by focusing on the substantive aspects of fragmentation in the light of the Vienna Convention on the Law of Treaties, while leaving aside institutional considerations pertaining to fragmentation. It sought to attain an outcome that would be concrete and of practical value especially for legal experts in foreign offices and international organizations. Accordingly, it decided to prepare, as the substantive outcome of its work: (a) a relatively large analytical study on the question of fragmentation, composed on the basis of the individual outlines and studies submitted by individual members of the Study Group during 2003-2005 and discussed in the Group and (b) a single collective document containing a set of conclusions emerging from the studies and the discussions in the Study Group. The latter was to be a concrete, practice-oriented set of brief statements that would serve, on the one hand, as the summary and conclusions of the Study Group's work and, on the other hand, as a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice.[1010]

[1009] *Ibid., Sixtieth Session, Supplement No. 10* (A/60/10), paras. 449-493.

[1010] *Ibid.*, paras. 447-448. See also *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. IX; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), paras. 416-418; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 301-302.

236. At its 2859th, 2860th and 2864th meetings, on 28 and 29 July and on 3 August 2005, the Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the status of work of the Study Group.

B. Consideration of the topic at the present session

237. At the current session, the Study Group was reconstituted and it held 10 meetings on 17 and 26 May, on 6 June, on 4, 11, 12, 13 and 17 July 2006. The Study Group had before it a study finalized by the Chairman of the Study Group, Mr. Martti Koskenniemi, as well as a set of draft conclusions based on that study. The former document summarized and analysed the phenomenon of fragmentation on the basis of the studies prepared by the various members of the Study Group and taking into account the comments made by members of the Study Group (A/CN.4/L.682 and Corr.1). The latter document incorporated the draft conclusions of the Study Group's work between 2002 and 2005, as well as additional draft conclusions (A/CN.4/L.682/Add.1) and a section on background. The substantive work of the Study Group during the present session was focused on finalizing these conclusions. At its meeting on 17 July 2006, the Study Group completed its work and adopted its report containing 42 conclusions (see, sect. D.II, below). The Study Group stressed the importance of the collective nature of its conclusions. It also emphasized that these conclusions had to be read in connection with the analytical study, finalized by the Chairman, on which they are based.

238. At the 2901st and 2902nd meetings of the Commission, on 27 and 28 July 2006, the Chairman of the Study Group introduced the report of the Study Group.

239. At its 2902nd, 2911th and 2912th meetings, on 28 July, 9 and 10 August 2006, the Commission considered the report of the Study Group (sect. D, below). A proposal by a member to make a distinction between positive and negative fragmentation was not endorsed by the Commission. After an exchange of views, the Commission at its 2902nd meeting decided to take note of the conclusions of the Study Group (sect. D.II, below), and at its 2912th meeting commended them to the attention of the General Assembly. At its 2911th meeting, the Commission requested that, in accordance with the usual practice, the analytical study finalized by the Chairman of the Study Group be made available on the website of the Commission and also be published in its Yearbook.

C. Tribute to the Study Group and its Chairman

240. At its 2911th meeting, on 9 August 2006, the Commission adopted the following resolution by acclamation:

> "*The International Law Commission*,
>
> *Having taken note of* report and the conclusions of the Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law,
>
> *Expresses* to the Study Group and its Chairman, Mr. Martti Koskenniemmi, its deep appreciation and warm congratulations for the outstanding contribution made in the preparation of the report on fragmentation of international law and for the results achieved in the elaboration conclusions, as well as the accompanying study on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law finalized by the Chairman."

D. Report of the Study Group

1. Background

241. In the past half-century, the scope of international law has increased dramatically. From a tool dedicated to the regulation of formal diplomacy, it has expanded to deal with the most varied kinds of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation. New multilateral institutions, regional and universal, have been set up in the fields of commerce, culture, security, development and so on. It is difficult to imagine today a sphere of social activity that would not be subject to some type of international legal regulation.

242. However, this expansion has taken place in an uncoordinated fashion, within specific regional or functional groups of States. Focus has been on solving specific problems rather than attaining general, law-like regulation. This reflects what sociologists have called "functional differentiation", the increasing specialization of parts of society and the related autonomization of those parts. It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

243. The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such highly specialized forms of knowledge as "investment law" or "international refugee law", etc. - each possessing their own principles and institutions.

244. While the reality and importance of fragmentation cannot be doubted, assessments of the phenomenon have varied. Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a predominantly technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination.[1011] It is in order to assess the significance of the problem of fragmentation and, possibly, to suggest ways and means of dealing with it, that the Commission in 2002 established the Study Group to deal with the matter.

245. At the outset, the Commission recognized that fragmentation raises both institutional and substantive problems. The former have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations *inter se*. The

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[1011] "Fragmentation" is a very frequently treated topic of academic writings and conferences today. Out of the various collections that discuss the diversification of the sources of international regulation, see for example Eric Loquin & Catherine Kessedjian (eds.), *La mondialisation du droit* (Paris: Litec, 2000); and Paul Schiff Berman, *The Globalization of International Law* (Aldershot: Ashgate, 2005). The activity of traditional organizations is examined in José Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005). Different perspectives of non-treaty law-making today are also presented in Rüdiger Wolfrum & Volker Röben (eds.), *Developments of International Law in Treaty-making* (Berlin: Springer, 2005) pp. 417-586 and Ronnie Lipschutz & Cathleen Vogel, "Regulation for the Rest of Us? Global Civil Society and the Privatization of Transnational Regulation", in R.R. Hall & T.J. Bierstaker, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002) pp. 115-140. See also "Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle", *New York Journal of International Law and Politics*, vol. 31 (1999) pp. 679-993; Andreas Zimmermann & Reiner Hoffmann, with assisting editor Hanna Goeters, *Unity and Diversity of international Law* (Berlin: Duncker & Humblot, 2006); Karel Wellens & Rosario Huesa Vinaixa (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (Brussels: Bruylant, 2006 forthcoming). A strong plea for unity is contained in Pierre Marie Dupuy, "L'unité de l'ordre juridique internationale. Cours général de droit international public", *Recueil des Cours* ..., vol. 297 (2002). For more references, see Martti Koskenniemi & Päivi Leino, "Fragmentation of International Law. Postmodern Anxieties?", *Leiden Journal of International Law*, vol. 15 (2002) pp. 553-579.

Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the substantive question - the splitting up of the law into highly specialized "boxes," that claim relative autonomy from each other and from the general law. What are the substantive effects of specialization? How should the relationship between such "boxes" be conceived? More concretely, if the rules in two or more regimes conflict, what can be done about such conflicts?

246. Like the majority of academic commentators, the Commission has understood the subject to have both positive and negative sides, as attested to by its reformulation of the title of the topic: "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". On the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices. On the other hand, it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques. Fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world. At the same time, it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation. Although fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflicts that may have arisen in the past.

247. The rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, so-called "self-contained regimes" and geographically or functionally limited treaty-systems, creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of "environmental law", for example, is a response to growing concern over the state of the international environment. "Trade law" develops as an instrument to respond to opportunities created by comparative advantage in international economic relations. "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity". Each rule-complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specialization. "Trade law" and "environmental law", for example, have highly specific objectives and rely on principles that

may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations become general and frequent, the unity of the law suffers.

248. It is quite important to note that such deviations do not emerge as legal-technical "mistakes". They reflect the differing pursuits and preferences of actors in a pluralistic (global) society. A law that would fail to articulate the experienced differences between the interests or values that appear relevant in particular situations or problem areas would seem altogether unacceptable. But if fragmentation is a "natural" development (indeed, international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it), there have likewise always been countervailing, equally natural processes leading in the opposite direction. For example, general international law has continued to develop through the application of the Vienna Convention on the Law of Treaties of 1969 (VCLT), customary law and "general principles of law recognized by civilized nations". The fact that a number of treaties reflect rules of general international law, and in turn, certain provisions of treaties enter into the corpus of general international law, is a reflection of the vitality and synergy of the system and the pull for coherence in the law itself.

249. The justification for the Commission's work on fragmentation has been in the fact that although fragmentation is inevitable, it is desirable to have a framework through which it may be assessed and managed in a legal-professional way. That framework is provided by the VCLT. One aspect that unites practically all of the new regimes (and certainly all of the most important ones) is that they claim binding force from and are understood by the relevant actors to be covered by the law of treaties. This means that the VCLT already provides a unifying frame for these developments. As the organ that once prepared the VCLT, the Commission is in a privileged position to analyse international law's fragmentation from that perspective.

250. In order to do that, the Commission's Study Group held it useful to have regard to the wealth of techniques in the traditional law for dealing with tensions or conflicts between

legal rules and principles. What is common to these techniques is that they seek to establish meaningful relationships between such rules and principles so as to determine how they should be used in any particular dispute or conflict. The following conclusions lay out some of the principles that should be taken account of when dealing with actual or potential conflicts between legal rules and principles.

II. Conclusions of the work of the Study Group

251. The conclusions reached in the work of the Study Group are as follows:

1. General

(1) *International law as a legal system.* International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[1012] For that purpose the relevant relationships fall into two general types:

- *Relationships of interpretation.* This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.

[1012] That two norms are *valid* in regard to a situation means that they each cover the facts of which the situation consists. That two norms are *applicable* in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

- *Relationships of conflict.* This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the VCLT.

(3) *The VCLT.* When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31-33 having to do with the interpretation of treaties.

(4) *The principle of harmonization.* It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

2. The maxim *lex specialis derogat legi generali*

(5) *General principle.* The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards.[1013] The source of the norm (whether treaty, custom or general

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[1013] For application in relation to provisions within a single treaty, see *Beagle Channel Arbitration (Argentina v. Chile)* ILR vol. 52 (1979) p. 141, paras. 36, 38 and 39; Case C-96/00, *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398-6399, paras. 35-36 and p. 6404, para. 59; *Brannigan and McBride v. the United Kingdom*, Judgment of 28 May 1993, ECHR Series A (1993) No. 258, p. 57, para. 76; *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984, ECHR Series A (1984) No. 77, p. 27, para. 60; *Murray v. the United Kingdom*, Judgment of 28 October 1994, ECHR Series A (1994) No. 300, p. 37, para. 98 and *Nikolova v. Bulgaria*, Judgment of 25 March 1999, ECHR 1999-II, p. 25, para. 69. For application between different instruments, see *Mavrommatis Palestine Concessions case, P.C.I.J. Series A*, No. 2 (1924) p. 31. For application between a treaty and non-treaty standards, *INA Corporation v. Government of the Islamic Republic of Iran*, Iran-US C.T.R. vol. 8, 1985-I, p. 378. For application between particular and general custom, see *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits) I.C.J. Reports 1960*, p. 6 at p. 44. The Court said: "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules."

principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.[1014]

(6) *Contextual appreciation.* The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant - i.e. whether it is the speciality or the time of emergence of the norm - should be decided contextually.

(7) *Rationale of the principle.* That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Functions of lex specialis.* Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify as well as set aside general law.

(9) *The effect of lex specialis on general law.* The application of the special law does not normally extinguish the relevant general law.[1015] That general law will remain valid and applicable and will, in accordance with the principle of harmonization under conclusion (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[1016]

[1014] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) I.C.J. Reports 1986*, p. 14 at p. 137, para. 274, the Court said: "In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim."

[1015] Thus, in the Nicaragua case, *ibid.* p. 14 at p. 95 para. 179 the Court noted: "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."

[1016] In the *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996*, p. 240, para. 25, the Court described the relationship between human rights law and the laws of armed conflict in the following way: "... the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant ... The test of what is an arbitrary deprivation of life,

(10) *Particular types of general law.* Certain types of general law[1017] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable as set out in conclusions (32), (33), (40) and (41), below.[1018] Moreover, there are other considerations that may provide a reason for concluding that a general law would prevail in which case the *lex specialis* presumption may not apply. These include the following:

- Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable;
- Whether the application of the special law might frustrate the *purpose* of the general law;
- Whether third party beneficiaries may be negatively affected by the special law; and
- Whether the balance of rights and obligations, established in the general law would be negatively affected by the special law.

3. Special (self-contained) regimes

(11) *Special ("self-contained") regimes as lex specialis.* A group of rules and principles concerned with a particular subject matter may form a special regime ("Self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

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however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".

[1017] There is no accepted definition of "general international law". For the purposes of these conclusions, however, it is sufficient to define what is "general" by reference to its logical counterpart, namely what is "special". In practice, lawyers are usually able to operate this distinction by reference to the context in which it appears.

[1018] In the *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, (Ireland v. United Kingdom)* (Final Award, 2 July 2003) ILR vol. 126 (2005) p. 364, para. 84, the tribunal observed: "[e]ven then, [the OSPAR Convention] must defer to the relevant *jus cogens* with which the parties' *lex specialis* may be inconsistent."

(12) Three types of special regime may be distinguished:

- Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the articles on Responsibility of States for internationally wrongful acts.[1019]

- Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).[1020]

- Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.

(13) *Effect of the "speciality" of a regime.* The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

[1019] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76. In the *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) I.C.J. Reports 1980* at p. 40, para. 86, the Court said: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse."

[1020] See *Case of the S.S. "Wimbledon", P.C.I.J. Series A*, No. 1 (1923) pp. 23-4, noting that the provisions on the Kiel Canal in the Treaty of Versailles of 1919: "... differ on more than one point from those to which other internal navigable waterways of the [German] Empire are subjected ... the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways ... is limited to the Allied and Associated Powers alone ... The provisions of the Kiel Canal are therefore self-contained".

(14) *The relationship between special regimes and general international law.* A special regime may prevail over general law under the same conditions as *lex specialis* generally (see conclusions (8) and (10) above).

(15) *The role of general law in special regimes: Gap-filling.* The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.[1021]

(16) *The role of general law in special regimes. Failure of special regimes.* Special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, would have to be assessed above all by an interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable.

[1021] Thus, in *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57, the European Court of Human Rights canvassed the relationship between the European Convention on Human Rights and Fundamental Freedoms and general international law as follows: "the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part".

Similarly in *Korea - Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96, the Appellate Body of the WTO noted the relationship between the WTO Covered agreements and general international law as follows: "We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

4. Article 31 (3) (c) VCLT

(17) *Systemic integration.* Article 31 (3) (c) VCLT provides one means within the framework of the VCLT, through which relationships of interpretation (referred to in conclusion (2) above) may be applied. It requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in relations between the parties". The article gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

(18) *Interpretation as integration in the system.* Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31-32 VCLT. These paragraphs describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31 (3) (c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.[1022]

(19) *Application of systemic integration.* Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

[1022] In the *Oil Platforms* case *(Iran v. United States of America) (Merits) I.C.J. Reports 2003*, at para. 41, the Court spoke of the relations between a bilateral treaty and general international law by reference to article 31 (3) (c) as follows: "Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law … The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty."

(*a*) The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms;[1023]

(*b*) In entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.[1024]

Of course, if any other result is indicated by ordinary methods of treaty interpretation that should be given effect, unless the relevant principle were part of *jus cogens*.

(20) *Application of custom and general principles of law.* Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31 (3) (c) especially where:

(*a*) The treaty rule is unclear or open-textured;

(*b*) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19) (a) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules.* Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary

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[1023] *Georges Pinson* case (*France v. United Mexican States*) Award of 13 April 1928, UNRIAA, vol. V, p. 422. It was noted that parties are taken to refer to general principles of international law for questions which the treaty does not itself resolve in express terms or in a different way.

[1024] In the *Case concerning the Right of Passage over Indian Territory* (*Portugal v. India*) (*Preliminary Objections*) *I.C.J. Reports 1957*, p. 125 at p. 142, the Court stated: "It is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."

international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality.* International law is a dynamic legal system. A treaty may convey whether in applying article 31 (3) (c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.[1025]

(23) *Open or evolving concepts.* Rules of international law subsequent to the treaty to be interpreted may be taken into account especially where the concepts used in the treaty are open or evolving. This is the case, in particular, where: (a) the concept is one which implies taking into account subsequent technical, economic or legal developments;[1026]

[1025] The traditional rule was stated by Judge Huber in the *Island of Palmas* case (*the Netherlands v. United States of America*) Award of 4 April 1928, UNRIAA, vol. II, p. 829, at p. 845, in the context of territorial claims: "... a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled ... The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law".

[1026] In the *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia) I.C.J. Reports 1997*, p. 7 at pp. 67-68, para. 112, the Court observed: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan."

In the Arbitration regarding the Iron Rhine (IJZEREN RIJN) Railway (Belgium v. Netherlands) of 24 May 2005, a conceptual or generic term was not in issue but a new technical development relating to the operation and capacity of a railway. Evolutive interpretation was used to ensure the effective application of the treaty in terms of its object and purpose. The Tribunal observed in paragraphs 82 and 83: "The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was 'commercial communication'. It necessarily follows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium". Text of award available on >http://www.pca-cpa.org> (last visited on 14 July 2006).

(b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.[1027]

5. Conflicts between successive norms

(24) *Lex posterior derogat legi priori.* According to article 30 VCLT, when all the parties to a treaty are also parties to an earlier treaty on the same subject, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law".

(25) *Limits of the "lex posterior" principle.* The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty. In such cases, as provided in article 30 (4) VCLT, the State that is party to two incompatible treaties is bound *vis-à-vis* both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, it risks being responsible for the breach of one of them unless the concerned parties agree otherwise. In such case, also article 60 VCLT may become applicable. The question which of the incompatible

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[1027] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 31, para. 53. The Court said that the concept of "sacred trust" was by definition evolutionary. "The parties to the Covenant must consequently be deemed to have accepted [it] as such. That it is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half a century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."

In the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) I.C.J. Reports 1997*, pp. 76-80, paras. 132-147, the ICJ noted that: "[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them ... [in] ... the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan ... ".

treaties should be implemented and the breach of which should attract State responsibility cannot be answered by a general rule.[1028] Conclusions (26)-(27) below lay out considerations that might then be taken into account.

(26) *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes".* The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime). In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined.

(27) *Particular types of treaties or treaty provisions.* The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose. The limitations that apply in respect of the *lex specialis* presumption in conclusion (10) may also be relevant with respect to the *lex posterior.*

(28) *Settlement of disputes within and across regimes.* Disputes between States involving conflicting treaty provisions should be normally resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had, where appropriate, to other available means of

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[1028] There is not much case-law on conflicts between successive norms. However, the situation of a treaty conflict arose in *Slivenko and others v. Latvia* (Decision as to the admissibility of 23 January 2002) ECHR 2002-II, pp. 482-483, paras. 60-61, in which the European Court of Human Rights held that a prior bilateral treaty between Latvia and Russia could not be invoked to limit the application of the European Convention on Human Rights and Fundamental Freedoms: "It follows from the text of Article 57 (1) of the [European Convention on Human Rights], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention … In the Court's opinion, the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions."

dispute settlement. When the conflict concerns provisions within a single regime (as defined in conclusion (26) above), then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen.

(29) *Inter se agreements.* The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 VCLT. Such agreements are an often used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and the agreement: "(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (article 41 (1) (b) VCLT).

(30) *Conflict clauses.* When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:

(*a*) They may not affect the rights of third parties;

(*b*) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;

(*c*) They should, as appropriate, be linked with means of dispute settlement.

6. Hierarchy in international law: *Jus cogens*, Obligations *erga omnes*, Article 103 of the Charter of the United Nations

(31) *Hierarchical relations between norms of international law.* The main sources of international law (treaties, custom, general principles of law as laid out in Article 38 of

the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*.[1029] Drawing analogies from the hierarchical nature of domestic legal system is not generally appropriate owing to the differences between the two systems. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or as expressive of "elementary considerations of humanity"[1030] or "intransgressible principles of international law".[1031] What effect such designations may have is usually determined by the relevant context or instrument in which that designation appears.

(32) *Recognized hierarchical relations by the substance of the rules: Jus cogens.* A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 VCLT), that is, norms "accepted and recognized by the international community of States as a whole from which no derogation is permitted".[1032]

(33) *The content of jus cogens.* The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.[1033] Also other rules

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[1029] In addition, Article 38 (d) mentions "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[1030] *Corfu Channel case (United Kingdom v. Albania) I.C.J. Reports 1949*, p. 22.

[1031] *Legality of the Threat or Use of Nuclear Weapons case*, Advisory Opinion, *I.C.J. Reports 1996*, para. 79.

[1032] Article 53 VCLT. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[1033] *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to article 40 of the draft articles on State Responsibility, paras. (4)-(6). See also commentary to article 26, para. (5). See also *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda) I.C.J. Reports 2006*, para. 64.

may have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted.

(34) *Recognized hierarchical relations by virtue of a treaty provision: Article 103 of the Charter of the United Nations.* A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter by virtue of which "In the event of a conflict between the obligations of the Members of the United Nations under the ... Charter and their obligations under any other international agreement, their obligations under the ... Charter shall prevail."

(35) *The scope of Article 103 of the Charter.* The scope of Article 103 extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council.[1034] Given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law.

(36) *The status of the United Nations Charter.* It is also recognized that the United Nations Charter itself enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance.[1035]

(37) *Rules specifying obligations owed to the international community as a whole: Obligations erga omnes.* Some obligations enjoy a special status owing to the universal scope of their applicability. This is the case of obligations *erga omnes*, that is obligations

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[1034] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures) I.C.J. Reports 1998*, para. 42 and *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. the United Kingdom) (Provisional Measures) I.C.J. Reports 1992*, paras. 39-40.

[1035] See Article 2 (6) of the Charter of the United Nations.

of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in the protection of the rights involved.[1036] Every State may invoke the responsibility of the State violating such obligations.[1037]

(38) *The relationship between jus cogens norms and obligations erga omnes.* It is recognized that while all obligations established by *jus cogens* norms, as referred to in conclusion (33) above, also have the character of *erga omnes* obligations, the reverse is not necessarily true.[1038] Not all *erga omnes* obligations are established by peremptory

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[1036] In the words of the International Court of Justice: "... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970*, p. 3 at p. 32, para. 33. Or, in accordance with the definition by the Instutut de droit international, an obligation *erga omnes* is "[a]n obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action". Institut de droit international, "Obligations and Rights *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1.

[1037] *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), articles on Responsibility of States for internationally wrongful acts, article 48 (1) (b). This would include common article 1 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, all of 12 August 1949.

[1038] According to the International Court of Justice "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character." *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970*, p. 3 at p. 32, para. 34. See also *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, paras. 155 and 159 (including as *erga omnes* obligations "certain ... obligations under international humanitarian law" as well as the right of self-determination). For the prohibition of genocide as an *erga omnes* obligation, see *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595 at para. 31, and *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo/Rwanda) I.C.J. Reports 2006*, at para. 64. In the Furundzija case, torture was defined as both a peremptory norm and an obligation *erga omnes*, see *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber ii, ILR, vol. 121 (2002), p. 260, para. 151.

norms of general international law. This is the case, for example, of certain obligations under "the principles and rules concerning the basic rights of the human person",[1039] as well as of some obligations relating to the global commons.[1040]

(39) *Different approaches to the concept of obligations erga omnes.* The concept of *erga omnes* obligations has also been used to refer to treaty obligations that a State owes to all other States parties (obligations *erga omnes partes*)[1041] or to non-party States as third party beneficiaries. In addition, issues of territorial status have frequently been addressed in *erga omnes* terms, referring to their opposability to all States.[1042] Thus, boundary and territorial treaties have been stated to "represent[] a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*".[1043]

(40) *The relationship between jus cogens and the obligations under the United Nations Charter.* The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24 (2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*.

[1039] *Barcelona Traction case, ibid.*

[1040] The obligations are illustrated by article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations, *Treaty Series*, vol. 610, p. 205 and article 136 of the United Nations Convention on the Law of the Sea, United Nations, *Treaty Series*, vol. 1834, p. 396.

[1041] Institut de droit international, "Obligations *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1 (b).

[1042] "In my view, when a title to an area of maritime jurisdiction exists - be it to a continental shelf or (*arguendo*) to a fishery zone - it exists *erga omnes*, i.e. is opposable to all States under international law", Separate Opinion of Judge Oda, *Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmar v. Norway) Judgment, I.C.J. Reports 1993*, p. 38 at p. 100, para. 40. See likewise, Separate Opinion by Judge De Castro, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 165: "… a legal status - like the *iura in re* with which it is sometimes confused - is effective *inter omnes* and *erga omnes*". See also Dissenting Opinion by Judge Skubiszewski, in *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 248, paras. 78-79.

[1043] *Government of the State of Eritrea v. the Government of the Republic of Yemen (Phase one: Territorial sovereignty and scope of the dispute)*, Arbitration Tribunal, 9 October 1998, ILR, vol. 114 (1999), p. 1 at p. 48, para. 153.

(41) *The operation and effect of jus cogens norms and Article 103 of the Charter*:

(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(*b*) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict.

(42) *Hierarchy and the principle of harmonization*. Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.

CHAPTER XIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Expulsion of aliens

252. The Commission had before it the second report of the Special Rapporteur for the topic, Mr. Maurice Kamto (A/CN.4/573) and a memorandum prepared by the Secretariat (A/CN.4/565). The Commission decided to consider the report at its next session in 2007.

B. Programme, procedures and working methods of the Commission and its documentation

253. At its 2899th meeting, held on 25 July 2006, the Commission established a Planning Group for the current session.[1044]

254. The Planning Group held three meetings. It had before it Section I of the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session entitled "Other decisions and conclusions of the Commission" and General Assembly resolution 60/22, in particular paragraphs 6, 7, 8, 13 and 16 on the Report of the International Law Commission on the work of its fifty-seventh session. It also had before it the proposed strategic framework for the period 2008-2009, concerning Programme 6 - Legal Affairs, Subprogramme 3, Progressive development and codification of international law, which it took note of.

255. At its 2907th meeting, held on 7 August 2006, the Commission took note of the report of the Planning Group.

1. Long-term Programme of Work

256. The Working Group on the Long-term Programme of Work, established by the Planning Group during the fifty-fourth session of the Commission (2002), with Mr. Pellet as Chairman, was reconstituted during the current session.[1045] The Working Group submitted its report to the Planning Group on 27 July 2006. The Working Group, in accordance with the established

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[1044] For the membership of the Planning Group, see para. 6 above.

[1045] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 521. For the membership of the Working Group see para. 10 above.

practice, was requested to report at the end of the quinquennium, at the fifty-eighth session (2006) of the Commission. The Working Group, during the quinquennium considered a number of topics, and requested members of the Working Group, other members of the Commission and the Secretariat to prepare drafts on those topics. The Working Group was guided by the recommendation of the Commission, at its forty-ninth session (1997), regarding the criteria for the selection of the topics:

> (*a*) The topic should reflect the needs of the States in respect of the progressive development and codification of international law;
>
> (*b*) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification;
>
> (*c*) The topic is concrete and feasible for progressive development;
>
> [and]
>
> … the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of international community.[1046]

257. Bearing in mind the criteria above, during the present quinquennium the Planning Group recommended and the Commission endorsed the inclusion of the following topics in the long-term programme of work of the Commission:

(*a*) The obligation to extradite or prosecute (*aut dedere aut judicare*);

(*b*) Immunity of State officials from foreign criminal jurisdiction;

(*c*) Jurisdictional immunity of international organizations;

(*d*) Protection of persons in the event of disasters;

(*e*) Protection of personal data in transborder flow of information;

(*f*) Extraterritorial jurisdiction.

[1046] *Yearbook … 1997*, vol. II (Part Two), pp. 71-72, para. 238.

258. The syllabuses on the topics that have been recommended for inclusion in the long-term programme of work, except for the topic "the obligation to extradite or prosecute (*aut dedere aut judicare*)", are annexed to the present report. It will be recalled, with respect to the topic "the obligation to extradite or prosecute (*aut dedere aut judicare*)", that an interim report, together with a syllabus, was submitted during the Commission's fifty-sixth session (2004) and its inclusion was recommended in the long-term programme of work.[1047] At the same session, the Commission agreed with the inclusion of this topic in its long-term programme of work.[1048]

259. Regarding the topic "The Most-favoured-nation clause", on which the Planning Group did not make a final recommendation, the Commission decided to seek the views of Governments as to the utility of further work by the Commission on this topic (Chapter III, para. 33).[1049]

260. The consolidated list included in the long-term programme of work since the forty-fourth session of the Commission (1992) is as follows:[1050]

(*a*) Law and practice relating to reservations to treaties;[1051]

(*b*) State succession and its impact on the nationality of natural and legal persons;[1052]

[1047] *Official Records of the General Assembly, Fifty-ninth Session, Supplement 10* (A/59/10), para. 362 and Annex.

[1048] *Ibid.*, para. 363.

[1049] The Commission included the topic "The Most-favoured-nation clause" in its programme of work at its twentieth session (1967) and appointed Endre Ustor and Nikolai A. Ushakov as the successive Special Rapporteurs. The Commission completed the second reading of the topic at its thirtieth session (1978). The General Assembly at its thirty-fifth, thirty-sixth, thirty-eighth, fortieth and forty-third sessions (1980, 1981, 1983, 1985 and 1988) invited comments from Governments and intergovernmental organizations, on the draft articles proposed by the Commission. At its forty-sixth session (1991) the General Assembly, in its decision 46/416, took note with appreciation of the work of the Commission as well as views and comments by Governments and intergovernmental organizations and decided to bring the draft articles to the attention of Member States and intergovernmental organizations for their consideration in such cases and to the extent as they deemed appropriate.

[1050] In order to establish a global view of the main fields of public international law, the Commission, at its forty-eighth session (1996) established a general scheme of topics classified under 13 main fields. The list was not intended to be exhaustive and was to serve as a general reference. For the list see *Yearbook ... 1996*, vol. II (Part Two), Annex II.

[1051] *Yearbook ... 1993*, vol. II (Part Two), para. 427. The Commission included this topic on its agenda at its forty-fifth session (1993), *ibid.*, para. 440. See also General Assembly resolution 48/31 of 9 December 1993. The title was subsequently changed to "Reservations to Treaties". *Yearbook ... 1995*, vol. II (Part Two), para. 487 (a).

[1052] *Ibid.*, para. 427. The Commission included this topic on its agenda at its forty-fifth session (1993), *ibid.*, para. 440. See also General Assembly resolution 48/31 of 9 December 1993. The title was subsequently changed to (*c*) Diplomatic protection;[1053]

(*d*) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction;[1054]

(*e*) Unilateral acts of States;[1055]

(*f*) Responsibility of international organizations;[1056]

(*g*) Shared natural resources of States;[1057]

(*h*) Risks ensuing from fragmentation of international law;[1058]

(*i*) Effects of armed conflict on treaties;[1059]

(*j*) Expulsion of aliens;[1060]

"Nationality in relation to the succession of States", *Yearbook ... 1996*, vol. II (Part Two), para. 88. See also General Assembly resolution 51/160 of 11 December 1996.

[1053] *Yearbook ... 1995*, vol. II (Part Two), para. 501. Pursuant to General Assembly resolution 51/160 of 11 December 1996, the Commission included this topic on its agenda at its forty-ninth session (1997), *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 169-171.

[1054] *Yearbook ... 1996*, vol. II (Part Two), para. 248.

[1055] *Ibid.* Pursuant to General Assembly resolution 51/160 of 11 December 1996, the Commission included this topic on its agenda at its forty-ninth session (1997), *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 191-194.

[1056] *Yearbook ... 2000*, vol. II (Part Two), para. 729. The Commission included this topic on its agenda at its fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 517.

[1057] *Ibid.* The Commission included this topic on its agenda at its fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 518.

[1058] *Ibid.* The Commission included this topic on its agenda at its fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 518. The title was subsequently changed to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", see *ibid.*, paras. 492-494.

[1059] *Ibid.* The Commission included this topic on its agenda at its fifty-sixth session (2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

[1060] *Ibid.* The Commission included this topic on its agenda at its fifty-sixth session (2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.

(*k*) The obligation to extradite or prosecute (*aut dedere aut judicare*);[1061]

(*l*) Immunity of State officials from foreign criminal jurisdiction;[1062]

(*m*) Jurisdictional immunity of international organizations;[1063]

(*n*) Protection of persons in the event of disasters;[1064]

(*o*) Protection of personal data in transborder flow of information;[1065] and

(*p*) Extraterritorial jurisdiction.[1066]

261. The Commission expressed its appreciation for the valuable assistance rendered by the Codification Division in the preparation of proposals on "Protection of persons in the event of disasters", "Protection of personal data in transborder flow of information", "Extraterritorial jurisdiction", and "Acquiescence and its effects on the legal rights and obligations of States", at the request, and for the consideration, of the Working Group of the Long-term Programme of Work.

2. Documentation and publications

262. The Commission considered the issue of timely submission of reports by Special Rapporteurs. Bearing in mind the rules and regulations relating to the submission of documents in the United Nations as well as the heavy workload of the relevant services of the Organization,

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[1061] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362 and 363 and Annex.

[1062] See para. 257 above, and Annex A below.

[1063] *Ibid.*, and Annex B below.

[1064] *Ibid.*, and Annex C below. It would be recalled that a proposal entitled "International protection of persons in critical situations" (2004) was prepared by Mr. M. Kamto for the consideration of the Working Group on the Long-term Programme of Work. Copies are on file with the Codification Division.

[1065] *Ibid.*, and Annex D below.

[1066] *Ibid.*, and Annex E below. It would be recalled that a proposal entitled "Extra-territorial application of national legislation" (1993) was prepared by Mr. P.S. Rao for the consideration of the Working Group on the Long-term Programme of Work. Copies are on file with the Codification Division.

the Commission emphasized once more the importance that it attaches to the timely submission of reports by Special Rapporteurs both in view of their processing and distribution sufficiently in advance to allow members to study the reports.

263. The Commission reiterated the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function of progressive development and codification of international law. While the Commission is aware of the advantages of being as concise as possible, it strongly believes that an *a priori* limitation cannot be placed on the length of its documentation and research projects, in particular reports of Special Rapporteurs.

264. The Commission expressed its appreciation for the valuable assistance of the Codification Division in its substantive servicing of the Commission and in preparation of research projects, by providing legal materials and their analysis. In particular, appreciation should be expressed for the extensive research reflected in the Secretariat memorandum on "Expulsion of aliens".

265. The Commission requested the Secretariat to provide it with information on publications that relate to the work of the Commission.

266. Taking into account the usefulness of the publication "Work of the International Law Commission" and the fact that the sixth edition was published in 2004, the Commission requested the Codification Division to prepare the seventh edition of the publication.

267. The Commission expressed its appreciation for the results of activity of its Secretariat in establishing the Commission's new website.[1067] The new site constitutes an invaluable resource for the Commission in undertaking its work and represents an information tool for research on the work of the Commission, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission encouraged the Secretariat to continue to develop the electronic database on the work of the Commission (including the Commission's new website) and to explore further options for its electronic dissemination.

[1067] Located at http://www.un.org/law/ilc/

3. Meeting with United Nations human rights experts

268. In accordance with article 25 (1) of its Statute,[1068] the Commission recommended that the Secretariat, in consultation with the Special Rapporteur on Reservations to treaties, organize a Meeting during the fifty-ninth session of the Commission, with United Nations experts in the field of human rights, including representatives from human rights treaty bodies, in order to hold a discussion on issues relating to reservations to human rights treaties.

4. Honoraria

269. The Commission reiterated once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which were expressed in its previous reports.[1069] The Commission emphasized again that the above resolution especially affects the Special Rapporteurs, in particular those from developing countries, as it compromises support for their research work. The Commission urges the General Assembly to reconsider this matter, with a view to restoring, at this stage, the honoraria for Special Rapporteurs.

C. Date and place of the fifty-ninth session of the Commission

270. The Commission decided that the fifty-ninth session of the Commission be held in Geneva from 7 May to 8 June and 9 July to 10 August 2007.

D. Cooperation with other bodies

271. At its 2899th meeting, on 25 July 2006, Judge Rosalyn Higgins, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it.[1070] An exchange of views followed.

[1068] Article 25 (1) of Statute provides: "The Commission may consult, if it considers it necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ."

[1069] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement 10* (A/57/10), paras. 525-531. *Ibid., Fifty-eighth Session, Supplement 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement 10* (A/59/10), para. 369; and *ibid., Sixtieth Session, Supplement 10* (A/60/10), para. 501.

[1070] This statement is recorded in the summary record of that meeting.

272. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Z. Kamil, who addressed the Commission at its 2898th meeting, on 21 July 2006.[1071] An exchange of views followed.

273. The Inter-American Juridical Committee was represented at the present session of the Commission by its Vice-President, Mr. Jean-Paul Hubert, who addressed the Commission at its 2904th meeting, on 3 August 2006.[1072] An exchange of views followed. The Commission also decided to express its congratulations to the Committee on the occasion of its centennial celebration and that it should be presented at the commemorative ceremony by M. Joao Baena Soares.

274. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by the Director General of Legal Affairs of the Council of Europe, Mr. Guy de Vel, who addressed the Commission at its 2904th meeting, on 3 August 2006.[1073] An exchange of views followed.

E. Representation at the sixty-first session of the General Assembly

275. The Commission decided that it should be represented at the sixty-first session of the General Assembly by its Chairman, Mr. Guillaume Pambou-Tchivounda.

276. The Commission expressed regrets that due to budgetary constraints, it was not possible for a Special Rapporteur to attend the sixty-first Session of the General Assembly.

F. International Law Seminar

277. Pursuant to General Assembly resolution 60/22, the forty-second session of the International Law Seminar was held at the Palais des Nations from 3 to 21 July 2006, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service in their country.

[1071] *Ibid.*

[1072] *Ibid.*

[1073] *Ibid.*

278. Twenty-five participants of different nationalities, mostly from developing countries, were able to take part in the session.[1074] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

279. The Seminar was open by Mr. Guillaume Pambou-Tchivounda, Chairman of the Commission. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar, assisted by Mr. Vittorio Mainetti, Legal Consultant at UNOG.

280. The following lectures were given by members of the Commission: Mr. Giorgio Gaja: "*Responsibility of International Organizations*"; Mr. Pemmaraju S. Rao: "*International Liability for Injurious consequences arising out of acts not prohibited by International law*"; Mr. Chusei Yamada: "*Shared Natural Resources: The Law of Transboundary Aquifers*"; Mr. Zdzislaw Galicki: "*Aud dedere aut judicare*"; Mr. Ian Brownlie: "*The Work of the International Court of Justice*"; Mr. John Dugard: "*Diplomatic Protection*"; Mr. Djamchid Momtaz: "*The Darfour Case before the International Crimiaal Court*"; Mr. Martti Koskenniemi: "*Fragmentation of International Law*".

281. Lectures were also given by Mr. Vittorio Mainetti, Assistant to the Director of the International Law Seminar: "*Introduction to the Work of the International Law Commission*"; Ms. Maria Isabel Torres-Cazorla, Professor of International Law at the University of Malaga: "*Unilateral Acts of States*"; Mr. Betrand Ramcharan, Former Deputy and Acting High Commissioner for Human Rights: "*The new Human Rights Council*"; Ms. Jelena Pejic, Legal Adviser International Committee of the Red Cross: "*Current Challenges to International*

[1074] The following persons participated in the forty-second session of the International Law Seminar: Mr. Andy Aron (Indonesia), Ms. Shakira Maria Bedoya-Sanchez (Peru), Mr. Kemoko Diakité (Senegal), Ms. Sasha Franklin (Trinidad and Tobago), Ms. Sandra García-Loredo (Mexico), Ms. Syuzanna Gevorgyan (Armenia), Mr. Henok Teferra (Ethiopia), Mr. Tamás Hoffmann (Hungary), Mr. Dan Oduor Juma (Kenya), Ms. Tomdwsam Kadjika (Togo), Mr. Andrey Kalinin (Russia), Ms. Chie Kojima (Japan), Ms. Sanaa Kourkmadi (Morocco), Mr. Emad Masalmeh (Jordan), Ms. Godelive Mbomakonga (Congo), Mr. Malefetsane Seth Moseme (Lesotho), Ms. Ilona Nieminen (Finland), Mr. Vasileios Pergantis (Greece), Mr. Dahai Qi (China), Mr. Yannick Radi (France), Mr. Emanuele Rebasti (Italy), Mr. Gustavo Ribeiro (Brazil), Ms. Myrtelle Rochette (Haiti), Mr. Visal Som (Cambodia), Ms. Cassandra Steer (Australia). The Selection Committee, chaired by Mr. Jean-Marie Dufour (President of the Geneva International Academic Network, GIAN), met on 9 May 2006 and selected 26 candidates out of 150 applications for participation in the Seminar. At the last minute, the twenty-sixth candidate selected failed to attend.

Humanitarian Law"; Ms. Brigitte Stern, Judge at the United Nations Administrative Tribunal (UNAT): *"The work of the UNAT"*. A meeting was also organized with Mr. Nicolas Michel, United Nations Legal Counsel, who addressed seminar participants and spoke about the activities of the Office of Legal Affairs.

282. Seminar participants were invited to visit the European Organization for Nuclear Research (CERN). The discussion focused on legal matters related to CERN. A morning was also devoted to the visit of the World Trade Organization (WTO), upon invitation of Mr. Georges Abi-Saab, Chairman of the WTO Appellate Body, and Mr. Werner Zdouc, Director of the WTO Appellate Body Secretariat. The discussion focused on the WTO Disputes Settlement System and on the Case Law of the Appellate Body.

283. In addition, a Conference-Debate was organized in the premises of the United Nations High Commissioner for Refugees (UNHCR), in the presence of Mr. Helmut Buss, Chief, Legal Affairs Section, and Mr. Stevenson Wolfson, Senior Legal Officer, Protection Operations and Legal Advice Section. The discussion focused on UNHCR's structure and mandate and on refugee law.

284. Seminar participants visited also the Office of the High Commissioner for Human Rights, at the Palais Wilson. After a briefing by Mr. Markus Schmidt (OHCHR) on the work of the Human Rights Committee, they attended the presentation of the UNMIK Report before the Human Rights Committee.

285. Each Seminar participant was assigned to one of three working groups on *"Fragmentation of International Law"*, *"Unilateral Acts of States"* and *"Diplomatic Protection"*. The Chairman of the Study Group and the special rapporteurs of the ILC for these subjects, Mr. Martti Koskenniemi, Mr. Victor Rodriguez Cedeño and Mr. John Dugard, provided guidance for the working groups. Moreover, two former Seminar participants, Ms. Maria Isabel Torres-Cazorla, University of Malaga, and Ms. Annemarieke Künzli, University of Leiden, assisted in the organization and coordination of the working groups. The groups presented their findings to the Seminar. Each participant was also assigned to submit a written summary report on one of the lectures. A collection of the reports was compiled and distributed to all participants.

286. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall followed by a reception.

287. Mr. Guillaume Pambou-Tchivounda, Chairman of the Commission, Mr. Ulrich von Blumenthal, Director of the Seminar, and Ms. Cassandra Steer, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-second session of the Seminar.

288. The Commission noted with particular appreciation that the Governments of Austria, China, Cyprus, Czech Republic, Finland, Germany, Ireland, Norway, Sweden and Switzerland had made or pledged voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed awarding a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 18 candidates and a partial fellowship (subsistence only) was awarded to 1 candidate.

289. Since 1965, year of the Seminar inception, 952 participants, representing 157 nationalities, have taken part in the Seminar. Of them, 576 have received a fellowship.

290. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many International Organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2007 with as broad participation as possible.

291. The Commission noted with satisfaction that in 2006 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.

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Annex A

Immunity of State officials from foreign criminal jurisdiction

(Mr. Roman A. Kolodkin)

A. A topical issue

1. The question of the immunity of State officials from foreign criminal jurisdiction has begun to attract greater attention in recent years. This is connected to a large extent with the growth of the concept of protection of human rights, a decline in willingness to tolerate gross violations of human rights, and efforts to combat terrorism, transnational crime, corruption and money laundering. Society no longer wishes to condone impunity on the part of those who commit these crimes, whatever their official position in the State. At the same time it can hardly be doubted that immunity of State officials is indispensable to keep stable inter-State relations.

2. Academic and public discussion as well as State practice, including domestic case law, in this area, were given a substantial boost following consideration of the case of former Chilean dictator General A. Pinochet in Great Britain.[1] Between 1998 and 2001 more than 20 attempts were made to institute criminal proceedings in domestic courts against senior incumbent and former officials of foreign States.[2] Specifically, there were attempts to prosecute President L.-D. Kabila of the Democratic Republic of the Congo in Belgium and France in 1998; Israeli Prime Minister A. Sharon in Belgium in 2001-2002; President M. Al-Qadhafi of Libya, President D. Sassou Nguesso of the Republic of the Congo and Cuban leader F. Castro in 2000-2001 in France; former President of Chad H. Habré in Senegal in 2001.[3]

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[1] United Kingdom High Court of Justice, Queen's Bench Division (Divisional Court): In *Re Augusto Pinochet Ugarte*, ILM, vol. 38 (1999), p. 68, at pp. 68-90; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis, Ex parte Pinochet*, ILM, vol. 37 (1998), p. 1302, at pp. 1302-1339; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex parte Pinochet*, ILM, vol. 38 (1999) p. 581, at pp. 581-663.

[2] For examples see, e.g.: Borghi A., *L'immunité des dirigeants politiques en droit international* (Genève: Heibing & Lichtenhahn, Genève, 2003), pp. 361-369.

[3] "Plusieurs affaires qui ont défrayé la chronique à la fin des années 1990 ont posé la question des limites de l'immunité de juridiction dont disposaient les chefs d'Etats ou anciens chefs d'Etats." P. Dailler et A. Pellet, *Droit international public*, Nguyen Quoc Dinh (7e édition, Paris, 2002), p. 453.

3. In 2002 the International Court of Justice rendered a judgment in the case concerning the "Arrest warrant of 11 April 2000" *(Democratic Republic of the Congo v. Belgium)*.[4] This judgment contains a valuable assessment of the state of international law in this field.

4. Currently before the International Court of Justice is a case concerning certain criminal proceedings in France *(Republic of the Congo v. France)*, the focus of which is also the immunity of senior State officials from foreign criminal jurisdiction. In 2003 the Court issued an order on the question of provisional measures which is of interest in the context of the matter under discussion.[5]

5. Following the above-mentioned judgment of the International Court of Justice, a number of rulings were issued by national courts, which are also of significance for consideration of this issue. For example, in 2004 appeal courts in the United States rendered final decisions in cases involving President R. Mugabe of Zimbabwe and former Chinese leader J. Zemin.[6] Although both of these judgements concerned immunity from civil jurisdiction, they are also of interest when considering the issue of immunity from foreign criminal jurisdiction.

6. It should be pointed out that the position of various State organs, including those representing the executive branch, on the issue under consideration from the viewpoint of international law was expressed on several occasions recently both during consideration of the above-mentioned court cases and independently of judicial procedures.[7]

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[4] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, at: www.icj-cij.org.

[5] *Case concerning certain criminal proceedings in France (Republic of Congo v. France), Order of 17 June 2003 - Request for the indication of a provisional measure*, at: www.icj-cij.org.

[6] *Tachiona v. United States*, 386 F.3d 205, 2004 U.S. App. LEXIS 20879 (2d Cir. Oct. 6, 2004) (Tachiona II); *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir. Sept. 8, 2004). For commentaries on these cases, see, for example: Andrews S., "U.S. Courts Rule on Absolute Immunity and Inviolability of Foreign Heads of State: The Cases against Robert Mugabe and Jiang Zemin," ASIL *Insight*, www.asil.org/insights/2004/11/insight041122.html.

[7] For example, in 2005, in connection with a planned visit to Russia by Prime Minister Y. Timoshenko of Ukraine, against whom criminal proceedings had been instituted in Russia long before her appointment to the post, the official position on the question of her immunity from criminal jurisdiction in the Russian Federation was publicly formulated by the Prosecutor-General of the Russian Federation. In particular, he pointed out that Prime Minister Y. Timoshenko of Ukraine would have no problem if she wished to visit Russia, since senior State leaders - including heads of government - enjoy immunity. At the same time he added that the criminal proceedings against

7. The issue of the immunity of State officials from foreign criminal jurisdiction most often provokes a significant public response when it is intended to indict such persons for gross violations of human rights (such as torture or genocide) and international humanitarian law. In relation to such crimes some States have recently been trying to exercise universal jurisdiction. However, this issue arises not only in connection with the exercise of universal jurisdiction in respect of international crimes (or crimes under international law), but also in the exercise of other types of jurisdiction. This happens, for example, when a State tries to prosecute under its own criminal law officials or former officials of another State who are suspected of crimes which are not connected with massive and gross violations of human rights but are nevertheless directed against the State exercising jurisdiction, or its nationals.

8. Originally, long before the human rights issue became topical, the problem of the immunity of a State, its representatives or property arose from the conflict between, on the one hand, the rights of such a State stemming from the principle of the sovereign equality of States, and on the other the rights of the State on whose territory these representatives or property were located, stemming from the principle of the full territorial jurisdiction of the latter. It seems that this conflict of rights and principle remains significant today. Indeed, it is obviously possible to say that it now displays new shades of meaning related to the development of universal and other types of domestic criminal jurisdiction, including extraterritorial jurisdiction, in the context of efforts to combat gross human rights violations, terrorism, transnational crime, money laundering, etc., against a background of globalization.

9. Nevertheless, despite the interrelation, issues of immunity and jurisdiction have an independent nature, and are regulated by different legal norms. As the International Court of Justice pointed out in the above-mentioned judgment, "rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby

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Y. Timoshenko would be extended. It was only on 26 December 2006, that the Main Military Prosecution of Russia announced the closing of the criminal case against former Prime Minister of Ukraine because of the expiration of the statute of limitations (http://genproc.gov.ru/ru/news/news_current_print.shtml?2005/12/2962_print.html).

requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law ...".[8] In one of the recent publications on the topic it was also rightly noted that, "a court faced with the violation of international law must first distinguish between jurisdictional immunities and the rules governing criminal jurisdictions of municipal courts".[9] Immunity is an obstacle to jurisdiction[10] and as such deserves a separate analysis.

10. The issue of the immunity of senior State officials from foreign criminal jurisdiction was examined by the Institute of International Law at the end of the last century. It adopted a resolution containing 16 articles[11] which, together with the corresponding *travaux préparatoires*, constitutes an important doctrinal source for the establishment of the content of international law in this field.

11. In 2004, by resolution 59/38, the United Nations General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property.[12] Under article 2, paragraph 1(b) (i) and (iv), of the Convention, the term "State" includes various organs of government, and also representatives of the State acting in that capacity. At the same time, article 3, paragraph 2, of the Convention states that it is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*. It is not entirely clear what this means for the immunity *ratione personae* of other officials and, in particular, such senior officials as heads of government and ministers for foreign affairs.[13] However, in any

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[8] *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, para. 59.

[9] Bankas E.K., *The State Immunity Controversy in International Law* (Berlin/Heidelberg: Springer, 2005), p. 296.

[10] It was stated in the draft article 2 of Draft Declaration on Rights and Duties of States: "Every State has the right to exercise jurisdiction over its territory and all persons and things therein, subject to the immunities recognized by international law." The Work of the International Law Commission (Sixth ed., vol. I, UN, New York, 2004), p. 262.

[11] Institute of International Law, *Yearbook*, vol. 69, 2000-2001 session of Vancouver (Paris: Pedone, 2001), pp. 442-709.

[12] Resolution 59/38 of 16 December 2004.

[13] The International Law Commission's commentary on this point states the following: "Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 2. Article 2, paragraph 1 (b) (i) and (v) [in the Convention this is subparagraph (iv) - R.K.] covers the various organs of the Government of a State and State representatives, including heads of State ... The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the

case paragraph 2 of the above-mentioned resolution states that the General Assembly agrees with the general understanding reached in the Ad Hoc Committee that the United Nations Convention on Jurisdictional Immunities of States and Their Property does not cover criminal proceedings.[14] The Chairman of the Ad Hoc Committee, when presenting its report at the fifty-ninth session of the General Assembly, pointed out that the Convention did not apply where there was a special immunity regime, including immunities *ratione personae (lex specialis)*.[15]

12. The charters and statutes of ad hoc international criminal tribunals (Nuremberg, Tokyo, Yugoslavia, Rwanda) and the statute of the International Criminal Court contain provisions which deprive State officials, including senior State officials, of immunity from the jurisdiction of these international organs.[16] However, here it is a question of international criminal jurisdiction.[17]

13. As regards the immunity of State officials from foreign national criminal jurisdiction, the corresponding provisions on this subject of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character are well known. However, these instruments concern only some specific aspects of the issue under consideration. The principal source of international law in relation to the immunity of State officials from foreign criminal jurisdiction is international custom.

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present articles. The existing customary law is left untouched." *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10* (A/46/10), pp. 35-36.

[14] The recommendation on this subject appears in paragraph 14 of the Ad Hoc Committee's report. *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22* (A/59/22).

[15] *Ibid., Fifty-ninth Session*, Sixth Committee, 13th meeting (A/C.6/59/SR.13).

[16] Article 7 of the Charter of the International Military Tribunal; article 6 of the Charter of the International Military Tribunal for the Far East; article 7, paragraph 2, of the Statute of the International Tribunal for the Former Yugoslavia; article 6, paragraph 2, of the Statute of the International Tribunal for Rwanda; article 27 of the Rome Statute.

[17] In the case concerning the arrest warrant, the International Court of Justice, it seems, drew a clear distinction between the situation as regards the immunity of senior State officials from international criminal jurisdiction, on the one hand, and from domestic criminal jurisdiction on the other. See International Court of Justice, *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, paras. 56-58.

B. The topic of immunity of State officials in the work of the International Law Commission

14. The Commission has addressed this topic more than once in one form or another. This took place during work on: the Draft Declaration on Rights and Duties of States;[18] the draft Principles of International Law Recognized in the Charter of the Nuremberg Tribunal;[19] the draft Code of Offences against the Peace and Security of Mankind (1954);[20] the draft Code of Offences against the Peace and Security of Mankind (1996);[21] draft articles on diplomatic[22] and consular[23] relations and immunities; draft articles on special missions;[24] draft articles on the representation of States in their relations with international organizations;[25] draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons;[26] and, as already mentioned, draft articles on jurisdictional immunities of States and their property.[27]

15. However, the International Law Commission has never examined the issue of the immunity of State officials from foreign criminal jurisdiction in a separate and focused manner.[28]

C. Should the International Law Commission examine the issue of the immunity of State officials from foreign criminal jurisdiction?

16. It seems that State practice as well as the rulings of domestic courts, the above-mentioned conventions, the judgment of the International Court of Justice in the "Arrest warrant" case and

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[18] See in particular draft article 2 and the commentary thereon. *Yearbook …, 1949*, p. 287.

[19] See in particular draft principle III and the commentary thereon. *Yearbook …, 1950*, vol. II, p. 192.

[20] See in particular draft article 3 and the commentary thereon. *Yearbook …, 1954*, vol. II, pp. 119-120.

[21] See in particular draft article 7 and the commentary thereon. *Yearbook …, 1996*, vol. II, Part Two, pp. 26-27.

[22] *Yearbook …, 1958*, vol. II, pp. 89-105.

[23] *Yearbook …, 1961*, vol. II, pp. 89-128.

[24] See in particular draft article 21 and the commentary thereon. *Yearbook …, 1967*, vol. II, p. 359.

[25] *Yearbook …, 1971*, vol. I, pp. 287 et seq.; *Yearbook …, 1971*, vol. II, pp. 101-110.

[26] *Yearbook …, 1972*, vol. II, pp. 309-323.

[27] See supra note 10.

[28] At a certain stage it was proposed to include in the draft articles on jurisdictional immunities of States and their property a provision on the immunity of sovereigns or heads of State from criminal jurisdiction. See in particular draft article 25 in the seventh report of the Special Rapporteur on this topic, Sompong Sucharitkul. *Yearbook …, 1985*, vol. II, Part One, pp. 44-45.

the work of the Commission hitherto bear witness to the fact that customary international law in this field exists. Although there is a variety of views on the subject, this conclusion, in our view, is also confirmed by international legal doctrine.[29]

17. It is undoubtedly important that State officials, and first and foremost senior State officials, who have committed crimes, especially massive and gross violations of human rights or international humanitarian law, should bear responsibility, including criminal responsibility. It is important that, where the rights of its nationals have been violated by criminal acts, a State should be able to exercise its criminal jurisdiction in respect of the suspected perpetrators. However, it is also crucially important that inter-State relations based on generally recognized principles of international law, and in particular the principle of the sovereign equality of States, should be stable and predictable, and, correspondingly, that officials acting on behalf of their States should be independent *vis-à-vis* other States.

18. The International Law Commission could make a contribution to ensuring a proper balance between these concepts through the codification and progressive development of international law, if it examined the issue of the immunity of State officials from foreign criminal jurisdiction and formulated its vision of the content of international law in this area.

D. Possible scope of consideration of the proposed topic

19. When analysing this topic in the Commission, it would be appropriate to examine the following issues in particular.

(1) The discussion should cover only immunity from domestic jurisdiction. The legal regime of this institution, as noted above, is distinct from the legal regime of immunity from international jurisdiction.

It is suggested that the analysis should be limited to issues of immunity from criminal jurisdiction. (At the same time, one might think about adding issues of immunity *ratione personae* from foreign civil and administrative jurisdiction to issues of immunity from foreign criminal jurisdiction, as, for example, in the above-mentioned draft articles of the Institute of International Law.)

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[29] A short list of publications on this topic is attached.

Of course, the focus should be immunity from foreign jurisdiction (it is well known that domestic legal systems provide for the immunity of certain State officials from the jurisdiction of the same State) and immunity under international and not domestic law.

(2) It will perhaps be necessary first to examine the concept of immunity (including the issue of immunity *ratione materiae* and immunity *ratione personae*) and the concept of criminal jurisdiction (including the issue of the principles on which it is based) for the purposes of this topic, and the relationship between them. There is a view that consideration of the issue of jurisdiction must precede consideration of the issue of immunity, since, in particular, the issue of immunity from jurisdiction arises only when the State has the requisite jurisdiction.[30]

It is worth defining the Commission's position concerning the nature of immunity - whether it is procedural or material in nature - and also, perhaps, concerning the question of whether it is peremptory in nature. The study of this latter question may be useful in the context of examination of the relations between immunity of State officials from foreign criminal jurisdiction and rules prohibiting torture, genocide, etc. which have the status of *jus cogens*.[31]

Here it would be worth examining the question of the relations between jurisdictional immunity and other legal doctrines which have similar consequences, such as the doctrine of the "act of State" and the doctrine of "non-justiciability".[32]

It is also desirable to look at the relations between immunity of State officials and immunity of the State itself and diplomatic immunity.

It is also necessary to analyse the relations between the concepts of "jurisdictional immunity", "inviolability", "immunity from procedural enforcement" and "immunity from execution".

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[30] See in particular: *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, paras. 3-5.

[31] On the question of these relations, see, for example: Judgment on the merits delivered by the Grand Chamber, *Al-Adsani v. The United Kingdom [GC], No. 35763/97*, ECHR 2001-XI, paras. 57-67; *Ibid.*, Joint Dissenting Opinion of Judges Rosakis and Caflish joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic.

[32] "It is however important to bear in mind that state immunity may appear as a doctrine of inadmissibility or non-justiciability rather than an immunity in a strict sense." Brownlie I., *Principles of Public International Law*, Fifth ed. (Oxford Univ. Press, N.Y., 1998), p. 326; see also, for example: Bianchi A., "*Immunity versus Human Rights: The Pinochet Case*", EJIL, vol. 10 (1999), pp. 266-270.

It would be important to include in the final product of the Commission's work on the topic (whatever form it might take) provisions relating to the differences between the institution of immunity of officials from jurisdiction, on the one hand, and the institution of criminal responsibility, on the other. Immunity does not mean impunity![33]

(3) At the beginning of the study it is important to examine the question of the foundation, the rational root of the immunity of State officials from foreign criminal jurisdiction. For example, does immunity derive only from a functional necessity, i.e. is it linked exclusively with the functions performed by the State officials? Or is it not only the functional component which is significant but also, for example, the fact that the official is acting on behalf of a sovereign State, which participates on an equal footing with other States in international relations, in ensuring the stability of which all States have an interest? Is the immunity of the officials of a State a manifestation of the rights of that State, stemming from its sovereignty? Or is the immunity of State officials from foreign criminal jurisdiction the result of the consent of a State possessing such jurisdiction not to exercise it in view of the acknowledged practical need to respect international courtesy?[34] Can the foundation of the immunity of State officials be the same as the foundation of the immunity of the State itself?[35] The logic governing consideration of this topic will depend to a large extent on the concept that is behind the immunity of State officials from foreign criminal jurisdiction.

(4) It is necessary to define which State officials enjoy this immunity. The judgment of the International Court of Justice in the "Arrest warrant" case refers to the immunity of ministers for foreign affairs and heads of State and government, and these persons are cited as

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[33] See on this subject: *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, para. 60.

[34] L. Caplan, for example, considers the foundation of State immunity to be the manifestation of "practical courtesy" on the part of the State possessing territorial jurisdiction. Caplan L.M., "State Immunity, Human Rights and *Jus cogens*: A Critique of the Normative Hierarchy Theory", AJIL, vol. 97 (2003), pp. 745-757.

[35] Concerning the foundations of immunity, including the immunity of officials, in the practice of the International Court of Justice, see, for example: Vereschetin, V.S. & Le Mon, C.J., "Immunities of Individuals under International Law in the Jurisprudence of the International Court of Justice", in: *The Global Community. Yearbook of International Law and Jurisprudence* (2004, vol. I, pp. 77-89, publ. by Oceana Publ., N.Y.).

examples of senior State officials who enjoy immunity from foreign jurisdiction.[36] The draft articles of the Institute of International Law speak only of heads of State and government.

The Commission may try to examine the issues of immunity of senior State officials, including heads of State and government and ministers for foreign affairs (in such cases, however, it must bear in mind the difficulties which will obviously arise in defining precisely which officials fall in the category of senior State officials). The other option is to examine the question of the immunity not only of senior but also of any other State officials.

However, it would seem to be better for the Commission to confine itself at first to heads of State and government and ministers for foreign affairs. At least in respect of this group of officials a sufficient body of State (including judicial) practice and doctrine exists.

The issue of immunity must be examined in respect of both present officials and former officials.

In addition, it would also be worth examining the issue of the immunity of members of the families of those officials whose immunity will be the subject of consideration by the Commission.

(5) It seems appropriate to analyse the relevance in the context of this topic of the issue of recognition of foreign States and governments and their heads. For example, in the case of M.A. Noriega, the Court of Appeals pointed out that "the district court rejected Noriega's head-of-State immunity claim because the United States Government never recognized Noriega as Panama's legitimate, constitutional ruler."[37]

(6) The central issue in this topic is the scope or limits of immunity of State officials from foreign criminal jurisdiction. Here a number of questions can be identified.

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[36] "... in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction of foreign States, both civil and criminal." *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, para. 51.

[37] *United States v. Noriega*, 117 F.3d 1206; 1997 U.S. App. LEXIS16493; 47 Fed. R. Evid. Serv. (Callaghan) 786; 11 Fla. L. Weekly Fed. C 103.

Firstly, the period of time during which a person enjoys immunity (the period when he or she occupies the corresponding post; the period after he or she leaves the post).

Secondly, the acts of the State official covered by immunity from foreign criminal jurisdiction. Acts in an official capacity, acts in a private capacity. Criteria for distinguishing between these categories of acts. Acts carried out before, during and after the occupation of a post. Here it is also appropriate to examine the question of whether criminally punishable acts, in particular international crimes, can be regarded as having been committed in an official capacity.[38]

Thirdly, does the solution of the question of the immunity of a State official from foreign criminal jurisdiction depend on whether he or she committed the crime in the territory of the State exercising jurisdiction, or outside it? Does it depend on whether, at the time of the exercise of foreign criminal jurisdiction, he or she is in the territory of the State exercising jurisdiction, or outside it?

Fourthly, does immunity depend on the nature of the presence of the official in the territory of the foreign State exercising jurisdiction (official visit, private visit, exile, etc.)?

Fifthly, does the immunity of a State official from foreign criminal jurisdiction signify that a foreign State cannot pursue any criminal procedures in relation to this person, or does it preclude only specific criminal procedures (specifically, only those procedural acts which directly affect the person enjoying immunity, and restrict his or her ability to perform his or her official functions)? For example, judging by the order on provisional measures in the case concerning certain criminal procedures (*Republic of the Congo v. France*), the International Court of Justice does not consider that the immunity of a head of State from foreign criminal jurisdiction is an obstacle to any criminal procedures pursued by a foreign State.[39]

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[38] See, for example: *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, para. 85.

[39] In any case, the Court did not consider those criminal procedures in respect of officials of the Congo which were applied in France, and the cessation of which was demanded by the Congo, as violating the rights of the Congo arising from the immunity of those persons. Accordingly, the Court did not consider it necessary for these procedures to be halted. *Case concerning certain criminal proceedings in France (Republic of Congo v. France), Order of 17 June 2003 – Request for the indication of a provisional measure*, paras. 30-35.

Sixthly, does immunity depend on the gravity of the crime of which the official is suspected? This question, which is obviously crucial, can also be considered as the question of whether exceptions exist to immunity.

The view that immunity, including the immunity of current State officials, does not exist in the case of the most serious crimes under international law was set out, for example, in the House of Lords in Great Britain during consideration of the Pinochet case and, in considerable detail, in the Belgian memorandum in the case concerning the arrest warrant before the International Court of Justice.[40] It is even held that there is a principle of "absence of immunity" from foreign criminal jurisdiction in respect of international crimes.[41]

However, in the opinion of the International Court of Justice, immunity is an obstacle to the exercise of foreign criminal jurisdiction in respect of a current senior State official irrespective of the gravity of the crime of which he or she is suspected.[42] Where current heads of State and government are concerned, this view was also reflected in the draft articles prepared by the Institute of International Law.[43]

Note that the issues relating to the scope or limits of the immunity must be considered separately in relation to current officials and former officials.

(7) If it is decided that the immunity of a State official from foreign criminal jurisdiction does not include the inviolability of this official, immunity from procedural enforcement and immunity from execution, the question arises whether these topics should also

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[40] UK House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis, Ex parte Pinochet*, ILM vol. 37 (1998), see for ex. Lord Millet, at p. 651, Lord Phillips of Worth Matravers, at p. 661; *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Counter-Memorial of the Kingdom of Belgium, 28 September 2001, www.icj-cij.org., paras. 3.5.10-3.5.150. See also, for example: Watts A., "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours* ... vol. 247 (1994-III), pp. 82-84 (it must be borne in mind, however, that this section of Sir Arthur Watts's lecture is devoted to the international responsibility of the head of State); *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, Dissenting Opinion of Judge Al-Khasawneh, paras. 5-7.

[41] Borghi A., *L'immunité des dirigeants politiques* ..., supra note 2, pp. 287-333.

[42] *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002*, paras. 56-61.

[43] Institute of International Law, supra note 11. See in particular article 2 of the resolution adopted by the Institute.

be considered in the framework of the subject. Here it would be possible to consider the question of immunity from procedural enforcement and execution in respect of the property of an official located in the territory of the foreign State exercising criminal jurisdiction.

(8) It will be necessary to examine the question of waiver of immunity. It is obvious that it is not the official but the State which has the right to waive his or her immunity. The question concerns which organ of State (which law is applicable in determining it - domestic or international?) and in what manner the State has the right to waive the immunity of its official (explicit waiver, implied waiver, ad hoc waiver, waiver of a general nature, for example, through the conclusion of an international treaty, etc.).

(9) It is necessary to consider the question of the form which the final product of the Commission's work on the proposed topic should take.

If the Commission decides to draw up draft articles, then it would be appropriate to consider whether to include in them provisions relating to the following two issues:

(10) *Lex specialis*. It would seem that any draft articles should contain a provision defining their relationship with special treaty regimes which provide for a different manner of regulating the issue in hand.

(11) Dispute settlement. The Commission may consider it desirable to set up a special regime for the settlement of disputes between governments regarding the immunity of State officials from foreign criminal jurisdiction.

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Annex B

Jurisdictional immunity of international organizations

(Mr. Giorgio Gaja)

1. The adoption of the 1969 Vienna Convention on the Law of Treaties and of the Articles on State Responsibility prompted the Commission to take up parallel studies with regard to international organizations. The recent adoption through UNGA resolution 59/38 of the UN Convention on Jurisdictional Immunities of States and Their Property gives the opportunity for the Commission to reconsider whether it should undertake a study of the jurisdictional immunity of international organizations.

2. The subject was for thirty years on the agenda of the Commission, as part of the study of "Relations between States and International Organizations." For the second part of the topic, entitled "Status, privileges and immunities of international organizations and their agents," Mr. Abdullah El-Erian and Mr. Leonardo Diaz Gonzalez successively acted as Special Rapporteurs. Draft articles were referred to the Drafting Committee but were not referred back to the Plenary. In 1992, the Commission decided "to put aside for the moment the consideration of a topic which does not seem to respond to a pressing need of States or of international organizations."[1]

3. It is true that many constituent instruments of international organizations, protocols on privileges and immunities or headquarters agreements provide for immunity. However, those provisions are often very general. Moreover, the question of immunity does not rarely arise before courts of States which are not bound by any treaty in this regard. The relevance of the topic also depends on the ever-increasing activities of many international organizations. Some problems are for instance raised by the practice of arranging meetings outside the territory of States with whom headquarters agreements are in force.

4. The existence of an obligation under general international law to grant immunity to international organizations has been asserted by several courts. According to the Labour Court of

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[1] *Yearbook … 1992*, vol. II (Part Two), p. 53, para. 362.

Geneva in *ZM v. Permanent Delegation of the League of Arab States to the United Nations*,[2] "international organizations, whether universal or regional," enjoy "absolute jurisdictional immunity." The Netherlands Supreme Court held in *Iran-United States Claims Tribunal v. AS*,[3] that "even in case where there is no treaty [...] it follows from unwritten international law that an international organization is entitled to the privilege of immunity from jurisdiction on the same footing as generally provided for in the treaties referred to above, in any event in the State in whose territory the organization has its seat, with the consent of the government of the host State." *In T.M. v. Ligue des Etas Arabes*, the Belgian Court of Cassation referred to immunity granted to international organizations either by a general principle of international law or by special agreements.[4]

5. Similar decisions were taken by the Court of Appeals for the District of Columbia in *Weidner v. International Telecommunications Satellite Organization*,[5] and in a string of judgments by the Supreme Court of the Philippines. For instance, in *South-east Asian Fisheries Development Center v. Acosta*,[6] the latter Court said: "One of the basic immunities of an international organization is immunity from local jurisdiction, i.e., that it is immune from the legal writs and processes issued by the tribunals of the country were it is found [...]."

6. Precedents like those referred to above suggest the need for a thorough inquiry into State practice with a view to reaching appropriate conclusions, whether on the basis of codification or progressive development.

7. A study on the jurisdictional immunity of international organizations would not simply involve ascertaining the extent to which rules governing State immunity may also be applied with regard to international organizations. Immunity of the latter has to be studied in the context of remedies that are available for bringing claims against an organization, according to the rules of that organization or to arbitration agreements. There is a need to avoid the risk of a denial of justice. Thus, for example, in the above-mentioned judgment of the Labour Court of Geneva, the

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[2] *Judgment of 17 November 1993*, ILR, vol. 116, p. 643 at p. 646.

[3] *Judgment of 20 December 1985*, ILR, vol. 94, p. 327 at p. 329.

[4] *Judgment of 3 December 2001*, available at www.cass.be.

[5] *Judgment of 21 September 1978*, ILR, vol. 63, p. 191 *et seq.*

[6] *Judgment of 2 September 1993*, available at www.lawphil.net.

Court considered whether there was a "real possibility of recourse to the administrative tribunal of the defendant Organization."[7] More recently, in *Pistelli v. Istituto Universitario Europeo*, the Italian Court of Cassation ruled that the immunity of an international organization from jurisdiction is admissible when the rules of the organization assure "jurisdictional protection of the same rights and interests in front of an independent and impartial court".[8]

8. Major issues raised by the topic

- Definition of international organizations which the study is intended to consider.
- Immunity from contentious jurisdiction. In particular: modalities to giving effect to immunity, consent to exercise of jurisdiction, effects of participation in a proceeding before a court, counterclaims; questions relating to commercial transactions, contracts of employment, property cases, participation in companies or other collective bodies; effect of an arbitration agreement.
- Immunity from measures of constraint in connection with proceedings before a court.
- Protection of the rights of natural and legal persons in relation to jurisdictional immunities of international organizations. In particular, the role of alternative means of settling disputes.

9. Applicable treaties, general principles or relevant legislation or judicial decisions

A few references to trends in treaties and national legislation and judicial decisions were made above. While treaties and legislation refer to a limited number of organizations, some judicial decisions considered also the question of jurisdictional immunity of international organizations in general terms.

10. Existing doctrine

Current views on the existence of rules of general international law covering immunities of international organizations are divided. While some studies still deny the existence of any such rule,[9] the prevailing trend in recent works is more favourable to admitting that some form of immunity[10] – sometimes, even absolute immunity – is part of international law. Immunity of jurisdiction from execution is more widely admitted.[11] A selected bibliographical note is attached.

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[7] Supra note 2, at p. 649.

[8] *Judgement of 28 October 2005*, RDI (2006), p. 248 *et seq.*, at p. 254 (translation by the author).

11. **Advantages of preparing a draft convention**

Given the number of instances in which treaties concerning immunities of international organizations do not apply and given also the general character of most treaty provisions, it would be in the interest of all concerned that the rules of international law governing immunities of international organizations should be more easily ascertainable. Due consideration should be made, where appropriate, to the need for progressive development. The increased importance of economic activities of international organizations, often in direct competition with the private sector, add urgency to the matter.

Should the topic be retained, it would lend itself to the preparation of a draft convention. This would apply alongside the Convention on jurisdictional immunities of States and their property.

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[9] See Glavinis, Les litiges relatifs aux contrats passés entre organisations internationales et personnes privées (Paris, 1990), at p. 122; De Bellis, L'immunità delle organizzazioni internazionali dalla giurisdizione (Bari, 1992), at p. 18; Klein, La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens (Bruxelles, 1998), at p. 230; Fox, The Law of State Immunity (Oxford, 2004), at p. 469.

[10] See Lalive, "L'immunité de juridiction des Etats et des organisations internationales", in *Recueil des cours …* (1953-III), p. 209 ff., at p. 304; Fedder, "The functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization", *American University Law Review*, vol. 9 (1960), p. 60 ff.; Conforti, *Diritto Internazionale*, Napoli, 2002, at p. 259. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Recueil des cours …* vol. 187 (1984-IV), p. 145 ff., at p. 220, held that a customary rule has coming to existence only with regard to the United Nations and the Specialized Agencies.

[11] See Schröer, "Sull'applicazione alle organizzazioni internazionali dell'immunità statale dalle misure esecutive", *Rivista di diritto int. privato e processuale* (1977), p. 575 ff., at p. 584; Dominicé, "L'immunité de juridiction et d'exécution des organisations…", supra note 10, at p. 225; Mousse, *Le contentieux des organisations internationales et de l'Union européenne* (Bruxelles 1997), at pp. 376-377; Zanghi, *Diritto delle Organizzazioni internazionali* (Torino, 2001), at. p. 330.

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Annex C

Protection of persons in the event of disasters

(Secretariat)

1. Introduction

1. The topic "protection of persons in the event of disasters" would fall within the category of "new developments in international law and pressing concerns of the international community as a whole" as contemplated by the Commission, at its forty-ninth session, upon establishing guidelines for the inclusion of topics in the long-term programme of work.[1] The focus of the topic would, at the initial stage, be placed on the protection of persons in the context of natural disasters or natural disaster components of broader emergencies, through the undertaking of activities aimed at the prevention, and mitigation of the effects, of natural disasters as well as through the provision of humanitarian relief in the immediate wake of natural disasters. In light of the present state of development of existing international law regulating disaster relief, as well as the perceived need for a systematization of such law, particularly from among the ranks of the disaster relief community (both within and beyond the United Nations), the consideration of such a topic by the Commission is merited.

2. Natural disasters are, however, a subset of a broader range of types of disasters, which include man-made and other technological disasters. A further distinction can be made between emergencies arising from the onset of a single (natural or other type of) disaster, and "complex emergencies" which may involve multiple disasters, including natural and man-made (such as armed conflict).[2] Furthermore, it is appreciated that such a distinction between natural and other types of disasters, such as technological disasters, is not always maintained in existing legal and others texts dealing with disasters, nor that it is always possible to sustain a clear delineation.

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[1] *Yearbook .... 1997*, vol. II (Part Two), para. 238.

[2] Complex emergencies have been defined as "a humanitarian crisis in a country, region or society where there is total or considerable breakdown of authority resulting from internal or external conflict and which requires an international response that goes beyond the mandate or capacity of any single agency and/or the ongoing United Nations program". Working Paper on the Definition of Complex Emergency, Inter-Agency Standing Committee, December 1994 (on file with the Codification Division).

Accordingly, while it is proposed that the more immediate need may be for a consideration of the activities undertaken in the context of a natural disaster, this would be without prejudice to the possible inclusion of the consideration of the international principles and rules governing actions undertaken in the context of other types of disasters.

2. Background context

Natural disasters

3. Leaving aside considerations of the impact of human activities on the environment, and their potential causal link to the frequency and severity of natural disasters, such disasters are distinguished by the fact that they emanate from naturally occurring episodes in the geological or hydrometeorological, as the case may be, history of the planet. Such "natural hazards" include: earthquakes, floods, volcanic eruptions, landslides, hurricanes (typhoons and cyclones), tornadoes, tsunamis (tidal waves), droughts and plagues. They are also typically costly in terms of loss of life and destruction of property.[3] Earthquakes often happen without warning and with widespread destruction and loss of life owing to the collapse of buildings, landslides or tsunamis.[4] While hurricanes (typhoons and cyclones), tornadoes, and even volcanic eruptions, may be predicted in advance, their onset can be sudden, violent, and destructive over a large geographic area, resulting in widespread dislocation, disruption in food and clean water supply and the outbreak of epidemics. In contrast, drought, food shortage or crop failure leading to famine have a slow onset but have equally devastating ramifications. By undermining development gains in a short period of time, such disasters also constitute a major impediment to sustainable development and poverty reduction.[5]

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[3] According to one estimate, in 2004 alone there were 360 disasters affecting more than 145 million people and causing more than US$ 103 billion in material damage. Report of the Secretary-General on the Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations, 2005, document A/60/87-E/2005/78, para. 4.

[4] *Ibid.* It is estimated that the massive earthquake that took place off the coast of Sumatra on 26 December 2004 and the resulting tsunami wave, which affected 12 countries across the entire Indian Ocean, killed more than 240,000 people and displaced well over a million more.

[5] Hyogo Declaration, adopted at the World Conference on Disaster Reduction on 22 January 2005, document A/CONF.206/6, resolution 1.

4. The fact that such events become "disasters" speaks more to the susceptibility of human beings to the adverse effects of natural hazards.[6] Indeed, with the burgeoning presence of human settlements in historically disaster-prone zones, such as floodplains, coastal areas and on geological faults (so-called earthquake "hot-spots"), the risks of loss and destruction have increased commensurately. In addition, nature knows no political boundaries. Many natural disasters affect several States at a time, or even entire regions; a point demonstrated by the 2004 tsunami. In such cases, disaster relief efforts take on an international dimension and character.

Contemporary activities in the provision of disaster relief

5. While in a disaster the responsibility for response and co-ordination lies with the affected State, international assistance may be requested by such State. Indeed, the involvement of the international community is not limited to multi-national disasters, but may be specifically requested by individual States seeking assistance in coping with the outcome of catastrophic events which take place entirely within their borders. Today, a diverse group of entities, including international organizations such as the United Nations and its specialized agencies, the major donor community and non-Governmental organizations, devote a substantial amount of resources to providing assistance to States and their populations which have been adversely affected by disasters.[7]

6. The General Assembly, in resolution 46/182 of 19 December 1991, recognized the key activities undertaken in this area as being: disaster prevention and mitigation; preparedness including through enhanced early-warning capacities; improving stand-by capacity such as contingency funding arrangements; issuing consolidated appeals for assistance; and providing coordination, cooperation and leadership in the provision of disaster relief.[8] Such classification of activities remains largely relevant today, even though the type of activities undertaken have evolved considerably since 1991.

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[6] See infra note 57 for a discussion of the term "hazard" and its link to "disasters".

[7] Within the United Nations, the responsibility for coordination of international response to disasters devolves to the United Nations Relief Coordinator who is also the Under-Secretary General for Humanitarian Affairs responsible for the Office for the Coordination of Humanitarian Affairs (OCHA).

[8] The resolution further recognizes the link between relief, rehabilitation and development.

7. At the operational level, time is of the essence in the wake of a disaster, with on-site coordination of response assets in real time being of particular importance.[9] Yet, humanitarian relief staff typically face a number of challenges in carrying out their mandates. These include: difficulties with sectoral coordination (both within and between sectors); limitations on the ability to mobilize technical expertise within the necessary timeframe; capacity gaps in water and sanitation, shelter and camp management and protection; limitations on the availability of adequate and prompt funding; difficulties with national and local preparedness and response capacity deficiencies; and deliberate targeting and killing of humanitarian staff.

8. While some obstacles are of a technical nature, others are legal where a regulatory framework would substantially expedite technical arrangements. Examples include inadequacies in existing regulatory frameworks, often designed for times of normalcy but ill-suited or ill-equipped to facilitate response measures during emergency situations. Expedited access for humanitarian relief personnel to the theatre of disaster may be impeded by visa, immigration and customs formalities, as well as over-flight and landing rights procedures and clearances. Logistical bottlenecks and delays at trans-shipment points may arise from the imposition of export and import controls as well as documentation and customs duties. Questions may arise relating to immunities and privileges as well as to the delimitation of liability. In addition, the safety of humanitarian relief staff, particularly United Nations and associated personnel, has recently been a matter of interest for the international legal community.[10] In complex emergencies, these problems may be compounded by the prevailing political situation in the State confronted by a natural disaster.

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[9] Arjun Katoch, "International natural disaster response laws, principles and practice, reflections, prospects and challenges", in International Federation of Red Cross and Red Crescent Societies, *IDRL International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003), p. 48.

[10] See the United Nations Convention on the Safety of United Nations and Associated Personnel, adopted in 1994, United Nations, Treaty Series, vol. 2051, p. 363, as well as the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, adopted by the General Assembly, in resolution 60/42 of 8 December 2005 (extending the scope of the 1994 Convention to cover United Nations operations established, *inter alia*, for the purposes of delivering emergency humanitarian assistance subject to the possibility that host States may make a declaration "opting out" of such regime where humanitarian assistance is delivered for the sole purpose of responding to a natural disaster).

Protection of victims

9. Humanitarian assistance, including disaster relief, is undertaken, *inter alia*, within the broader policy context of the question of the protection of victims of disasters, including natural disasters - an issue which continues to be the subject of discussion within the disaster relief community.[11] The present proposal is nonetheless also to be viewed as located within contemporary reflection on an emerging principle entailing the responsibility to protect,[12] which, although couched primarily in the context of conflict, may also be of relevance to that of disasters.

10. Of the three specific responsibilities identified by the High-Level Panel on Threats, Challenges and Change in 2004, as implicit in the overall responsibility to protect, the responsibility of the international community to prevent is considered the most pertinent to the topic at hand.[13] The principle of prevention, including through risk reduction, is well-established in the field of disaster relief and was, most recently, reaffirmed in the Hyogo Declaration[14] adopted at the World Conference on Disaster Reduction, held in January 2005. While recognizing the importance of involving all stakeholders, including regional and international organizations and financial institutions, civil society, including non-governmental organizations and volunteers, the private sector and the scientific community, the declaration affirms the primary responsibility of States to protect the people and property on their territory from hazards, whether natural or induced by human processes.[15]

3. Brief survey of existing norms and rules

11. The various activities undertaken at the international level in response to the incidence of disasters have come to be regulated by a series of legal norms which, taken collectively, have

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[11] See Humanitarian Response Review: Commissioned by the United Nations Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs, August 2005, §4.2, pp. 30-31.

[12] See Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004, document A/59/562 and Corr.1.

[13] It is proposed that the International Law Commission, in accordance with its traditional approach of focusing on the peaceful interaction between States, not consider the question of the responsibility to react in response, including through coercive measures and, in extreme cases, military intervention.

[14] Supra note 16, resolution 1.

[15] *Ibid.*, operative paragraphs 2 and 4, respectively.

been referred to as "International disaster response law" (IDRL).[16] IDRL is not an entirely new area of international law.[17] Its origins may be traced back at least to the mid-eighteenth century, when Emer de Vattel wrote:

> "… when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk[18] … if a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without, however, exposing themselves to scarcity … To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would absolutely refuse to do so … Whatever be the calamity affecting a Nation, the same help is due to it."[19]

12. In its modern form, IDRL denotes those rules and principles for international humanitarian assistance that apply in the context of a disaster, whether natural or technological, in peacetime.[20] More specifically the "core" of IDRL has been described as being: "[t]he laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response in times of non-conflict related disasters, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities."[21]

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[16] The title of the present proposal refers to disaster "relief" by way of clarifying the broader scope of the topic, i.e. not limited to the "response" phase. However, to the extent that the reference to "response" may include other related actions such as pre-disaster risk-mitigation activities the two phrases might be used interchangeably.

[17] Michael H. Hoffman, "What is the scope of international disasters response law?" in International Federation of Red Cross and Red Crescent Societies, IDRL *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (2003), p. 13.

[18] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Text of 1758, Books I, II, III, IV, Translation by Charles G. Fenwick with and introduction by Albert de Lapradelle (Carnegie Institution of Washington, 1916), vol. III, p. 114.

[19] *Ibid.*, p. 115. He noted at the same time that if that State can pay for the provisions furnished they may be sold for a fair price, noting that there is no duty of giving "it what it can obtain for itself and consequently no obligation of making a present of things which it is able to buy".

[20] Hoffman, supra note 28, p. 13.

[21] International Federation of Red Cross and Red Crescent Societies, "International Disaster Response Laws (IDRL): Project Report 2002-2003", 2003, p. 15.

13. In themselves, disasters have not been viewed as a direct source of international rights and obligations. However, they have on occasion led to the conclusion of international agreements.[22] Today, IDRL is composed of a relatively substantial body of conventional law, including a number of multilateral (both global and regional)[23] agreements as well as a significant network of bilateral treaties which has emerged in Europe and elsewhere.[24] Many of these agreements relate to the provision of mutual assistance, regulating requests for, and offers of, assistance, facilitation of entry into sovereign territory, technical cooperation, information sharing and training. Other common provisions relate to the regulation of access of personnel and equipment and their internal movement, entry of relief goods and customs, status, immunity and protection of personnel, and costs relating to disaster relief operations.[25]

14. A further source of rules can be found in a substantial number of memoranda of understanding and headquarters agreements, typically entered into between intergovernmental or

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[22] J.H.W. Verzijl, *International Law in Historical Perspective* (A.J. Sijthoff-Leiden, 1973), p. 47.

[23] While only two major multilateral agreements dealing specifically with disaster relief have been adopted in the post-war era, namely the 1986 Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, United Nations, *Treaty Series*, vol. 1457, p. 133 and the 1998 Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations (adopted at the Intergovernmental Conference on Emergency Telecommunications, held at Tampere, Finland, from 16 to 18 June 1998, document ICET-98) several other multilateral treaties may also be of relevance in that they deal with some aspects of disaster relief in the context of land, air and maritime transportation as well as customs procedures. Examples include the 1946 Convention on the Privileges and Immunities of the United Nations, United Nations, *Treaty Series*, vol. 1, p. 15 and vol. 90, p. 327; the 1980 Convention Concerning International Carriage by Rail, United Nations, *Treaty Series*, vol. 1397, p. 2; the 1944 Convention on International Civil Aviation, United Nations, *Treaty Series*, vol. 15, p. 295; the 1965 Convention on Facilitation of International Maritime Traffic, United Nations, *Treaty Series*, vol. 591, p. 265; the 1990 Convention on Temporary Admission , United Nations, *Treaty Series*, vol. 1762, p. 121; the 1973 Convention on the Simplification and Harmonization of Customs Procedure (adopted under the auspices of the Customs Cooperation Council) as well as the 1999 revised International Convention on the Simplification and Harmonization of Customs Procedures (adopted at Kyoto under the auspices of the World Customs Organization) include provisions aimed at facilitating departure, entry or transit of relief supplies as well as easing customs procedures. Also of some relevance is the 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Protocol, supra note 21, which, *inter alia*, establishes the duty of States to prevent and punish crimes against a specific class of protected personnel.

[24] Regional agreements include the 1987 Council of Europe Open Partial Agreement for the Prevention of, Protection Against and Organization of Relief in Major Natural and Technological Disasters, Resolution (87) 2 (adopted by the Committee of Ministers on 20 March 1987) and 1960 Agreement on the Temporary Important, Free of Duty, of Medical Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis of Treatment, Official Journal vol. L 131 , pp. 48-49; the 1991 OAS Inter-American Convention to Facilitate Disaster Assistance (adopted at the Twenty-First Regular Session of the General Assembly of The Organization of American States, held at Santiago, Chile, on 6 July 1991); and the 2005 ASEAN Agreement on Disaster Management and Emergency Response (adopted at Ventiane, on 26 July 2005).

[25] "International Disaster Response Laws (IDRL): Project Report 2002-2003", supra note 21, p. 16.

non-governmental organizations, and States. While many of these instruments tend to be context-specific, it is still possible to discern a number of general or common provisions that have come to be accepted as reflecting the received view as a matter of international law.

15. In addition, a significant amount of the development of IDRL has occurred in the realm of "soft-law" in the context of, *inter alia*, resolutions of the General Assembly and ECOSOC of the United Nations and other bodies such as the International Conference of the Red Cross; political declarations; as well as codes of conduct, operational guidelines, and internal United Nations rules and regulations which provide interpretative tools for preparedness, mobilization, coordination, facilitation and delivery of humanitarian assistance in times of disaster.[26] The contemporary "cornerstone" resolution is General Assembly Resolution 46/182, which, together with other instruments such as the resolution of the International Conference of the Red Cross on Measures to Expedite International Relief,[27] is a key component of an expanding regulatory framework which built upon, and has been supplemented by, a series of General Assembly resolutions[28] as well as other instruments, the most recent being the Hyogo Framework for Action.[29]

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[26] See, for example, the "Measures to Expedite International Relief", adopted at the 23rd International Conference of the Red Cross, res. 6, in *Handbook of the International Red Cross and Red Crescent Movement*, p. 811-15 (3d ed. 1994), see ECOSOC Res. 2102 (LXIII) of 3 August 1977; the International Conference Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations of 1969, *ibid*. p. 808; the Recommendations of the Customs Co-ordination Council to Expedite the Forwarding of Relief Consignments of 8 June 1970, document T2-423; The Sphere Project, Humanitarian Charter and Minimum Standards in Disaster Response, 2004; and The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, Annex VI to the resolutions of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995.

[27] See *ibid*.

[28] See G.A. Res. 2816 (XXVI) of 14 December 1971; 36/225 of 17 December 1981; 37/144 of 17 December 1982; 39/207 of 17 December 1984; 41/201 of 8 December 1986; 45/221 of 21 December 1990; 48/57 of 14 December 1993; 49/139 of 20 December 1994; 51/194 of 17 December 1996; 52/12 of 12 November 1997; 52/172 of 16 December 1997; 54/233 of 22 December 1999; 55/163 of 14 December 2000; 56/103 of 14 December 2001; 56/164 of 19 December 2001; 56/195 of 21 December 2001; 57/150 of 16 December 2002; 57/153 of 16 December 2002; 58/177 of 22 December 2003 and 59/231 of 22 December 2004.

[29] The Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, adopted on 22 January 2005 at the World Conference on Disaster Reduction, document A/CONF.206/6, resolution 2.

Applicability of international humanitarian law and other relevant rules of international law

16. Usually, commentators point to international humanitarian law as a point of reference and comparison in any efforts to develop IDRL.[30] The linkages between the two fields reflect a common heritage in the humanitarian impulse and relate to the unique respective missions of the ICRC and the IFRC. While it is doubtful whether IDRL would develop along similar lines as that in international humanitarian law,[31] there exist examples of rules of international humanitarian law which would be applicable to the provision of disaster relief, even if only by analogy.

17. Similarly, some principles and aspects of other rules of international law, such as those dealing with the environment, human rights, refugees and internally displaced persons, may be of relevance to a broader legal framework for disaster relief.

Systematization through codification and progressive development

18. While there is a growing recognition of the existence of IDRL, there also exists an appreciation that the field largely lacks coherence as a set of rules constituting a single body of law.[32] Proposals for codification can be traced as far back as the late nineteenth century to unsuccessful suggestions to extend the "Geneva Law", regulating international humanitarian law, also to victims of disasters. The establishment of the International Relief Union in 1927,[33] under the auspices of the League of Nations, signalled the first major attempt in the twentieth century to provide a legal and institutional framework for the provision of international relief for disasters. The preamble of the convention establishing the Union specifically envisaged as one of its purposes "to further the progress of international law in [the] field".

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[30] Hoffman, supra note 17, pp. 14-15.

[31] *Ibid.* p. 15.

[32] International Federation of Red Cross and Red Crescent Societies , "International Disaster Response Law: A Preliminary Overview and Analysis of Existing Treaty Law", January 2003, at p. 2.

[33] Created by the Convention Establishing an International Relief Union, League of Nations, *Treaty Series*, vol. 135, p. 247, which entered into force in 1932 with 30 States Parties. See Bradford Morse, "Practice, Norms and Reform of International Rescue Operations", *Recueil des Cours* ..., vol. 154 (1977-IV), pp. 125-193 at 132-3.

19. Although the Union proved largely ineffective and was superseded by the United Nations and its specialized agencies, several proposals for the codification of some aspects of IDRL have continued to be made in subsequent years.[34] In the United Nations, as early as 1971, the General Assembly, in resolution 2816 (XXVI), invited potential recipient countries to consider appropriate legislative and other measures to facilitate the receipt of aid, including over-flight and landing rights and necessary privileges and immunities for relief units. In the early 1980s, a study was undertaken, on the initiative of the United Nations Disaster Relief Coordinator, on the possibility of negotiating an instrument on disaster relief operations. It was subsequently examined in 1983 by a group of international legal experts, chaired by the then Chairman of the International Law Commission, and resulted in a proposal by the Secretary-General for a draft international convention on expediting the delivery of emergency relief.[35] The proposal was not considered further after its initial presentation in ECOSOC in 1984. Nor did a subsequent proposal for a convention on the duty of humanitarian assistance, in the late 1980s, meet with approval owing largely to resistance from several major non-governmental organizations.[36] A similar initiative was made at the fifteenth session of the World Food Council (of the World Food Programme), held in Cairo in 1989, which had before it a proposal for an international agreement on safe passage of emergency food aid to people affected by civil strife, war, and natural disasters.[37]

20. Summing up the situation in 1990, the Secretary-General, in his report on humanitarian assistance to victims of natural disasters and similar emergency situations, again acknowledged the perceived desirability of new legal instruments in order to overcome the obstacles in the way

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[34] For example, in 1980, the International Law Association, at its fifty-ninth conference held in Belgrade, adopted a report containing a Draft agreement for co-operation in disaster relief. See International Law Association, *Report of the Fifty-ninth Conference*, held at Belgrade (1982), p. 5.

[35] See document A/39/267/Add.1-E/1984/96/Add.2.

[36] See document A/45/587, at paras 43-44. A similar resistance had been earlier expressed to a proposal for the consideration of a "New International Humanitarian Order", which entailed, *inter alia*, the elaboration of an internationally recognized framework of comprehensive legal principles governing relations among peoples and nations in times of war and peace. See document A/40/348.

[37] *Official Records of the General Assembly, Forty-fourth session, Supplement 19* (A/44/19), Part one. At its sixteenth session in Bangkok in 1990, the Council's Executive Director was requested by Council Ministers to "further consult with all concerned institutions on the development of guidelines for more effective measures to ensure the safe passage of emergency food aid". It also recommended that the Secretary-General consider endorsement by the General Assembly of an international draft agreement, *ibid., Forty-fifth session, Supplement 19* (A/45/19). See also World Food Council, *Conclusions of the Meeting of Ministers in Bangkok, Thailand*, para. 31.

of humanitarian assistance, but limited his suggestions to "new legal instruments such as declarations of the rights of victims of disaster to relief and bilateral agreements between donors and recipient countries as well as between recipient countries".[38]

21. The idea of developing a legal framework for international assistance in the wake of natural disasters and environmental emergencies has been revived in recent years. In his 2000 report on Strengthening of the coordination of emergency humanitarian assistance of the United Nations,[39] the Secretary-General noted that such a framework may outline responsibilities of States receiving and providing assistance. Accordingly, he suggested that Member States consider drafting a convention on the deployment and utilization of international urban search and rescue teams, asserting that:

> "[s]uch a convention would provide a working framework for complex issues, such as utilization of air space, customs regulations for import of equipment, respective responsibilities of providing and recipient countries, that have to be resolved prior to international response to a sudden-onset natural disaster."[40]

22. Similarly, the 2000 *World Disasters Report*, issued by the IFRC, also lamented generally the limited legal progress. After noting that elements of law which assist in humanitarian relief work exist in some treaties, the Report described the situation as follows:

> "[a]t the core is a yawning gap. There is no definitive, broadly accepted source of international law which spells out legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to put together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways."[41]

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[38] Document A/45/587, paras. 41 and 45.

[39] Document A/55/82-E/2000/61.

[40] *Ibid.*, para. 135 (m).

[41] International Federation of the Red Cross and Red Crescent Societies, *World Disasters Report, Focus on Public Health* (2000), p. 145. In 2001, the IFRC initiated a study on the adequacy of existing legal and other mechanisms to facilitate humanitarian activities in response to natural and technological disasters. The study seeks to identify the most common legal problems in international disaster response, analyze the scope and implementation of existing international standards, and propose solutions for gap areas. See International Federation of the Red Cross and Red Crescent Societies, *International Disaster Response Law, Briefing paper*, April 2003, p. 2, and International

23. Moreover, increased emphasis has been placed on the risk reduction and prevention components of the topic following the adoption of the Hyogo Declaration, and the Hyogo Framework for Action 2005-2015 which specifically calls for consideration to be given to, *inter alia*, the strengthening of relevant international legal instruments related to disaster risk reduction.[42]

4. Proposal for consideration of the topic by the Commission

24. The objective of the proposal would be the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities; clarifying the core legal principles and concepts and thereby creating a legal "space" in which such disaster relief work could take place on a secure footing. A possible model would be the 1946 Convention on the Privileges and Immunities of the United Nations which, on the narrow aspect of privileges and immunities, serves as the basic reference point for the prevailing legal position, and which is routinely incorporated by reference into agreements between the United Nations and States and other entities. Similarly, the envisaged text regulating disaster relief could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.

25. Given the nature of what is a rapidly developing field, it is anticipated that the work on the topic would be primarily limited to the codification of existing norms and rules, with emphasis on progressive development as appropriate. The focus would thus be on the concretization of existing rules to facilitate activities being undertaken on the ground, as opposed to unnecessarily developing new norms which may inadvertently constrain such operational activities in an unforeseen manner.

Federation of Red Cross and Red Crescent Societies, *Revised IDRL Strategic Plan*, 2005-2007, available at <www.ifrc.org/idrl>. In the preamble of its resolution 57/150 of 16 December 2002, the General Assembly noted this development and stressed the need for intergovernmental oversight particularly with regard to principles, scope and objectives. In 2003, the 28th International Conference of the Red Cross and Red Crescent (comprised of all components of the Red Cross/Red Crescent Movement and the States Parties to the Geneva Conventions of 1949) mandated the IFRC and national societies to "lead collaborative efforts involving States, the United Nations and other relevant bodies in conducting research and advocacy activities" in this area and to report back to the International Conference in 2007. See *Final Goal 3.2.6*, 28th International Conference of the Red Cross and Red Crescent (December 2003). For a different perspective on the efficacy of the resort to international law in this area see: David P. Fidler, "Disaster Relief and Governance after the Indian Ocean Tsunami: what role for international law?", *Melbourne Journal of International Law*, vol. 6 (2005), p. 458 at pp. 471-3.

[42] Part IV.A, para. 22.

Brief substantive overview

(a) Scope

26. As already mentioned,[43] it is proposed that the Commission initially limit the scope *ratione materiae* of the topic to natural disasters (disasters linked to natural hazards), or natural disaster components of broader emergencies. At the same time, some reflection might be had as to the implications of drawing such distinction between natural and other disasters, even if by way of a without prejudice clause. In addition, various natural disasters have different distinguishing features: an analysis of such features may have to be undertaken in the process of delineating the scope *ratione materiae*.

27. As regards the scope *ratione loci*, the topic would cover primarily those rules governing the theatre of the disaster, but would also extend to where the planning, coordination and monitoring efforts occur. *Ratione temporis*, the scope of the topic would include not only the "response" phases of the disaster, but also the pre- and the post-disaster phases.[44]

28. Concerning the scope *ratione personae*, it is in the nature of the topic that, while State practice exists, it is primarily through the organs of intergovernmental organizations, such as the United Nations, as well as through the activities of non-governmental organizations and other non-State entities, such as the IFRC, that much of the activity occurs and, accordingly where a large part of the development of legal norms takes place. While earlier instruments tend to exclude non-governmental organizations from their scope of application, whether explicitly or implicitly, it is proposed that the Commission adopt a broader approach to also cover the staff of such entities. This would accord with current trends, as evidenced by the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which extends, for example, the provisions on privileges and immunities to staff members of non-governmental organizations involved in the provision of

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[43] See supra, paras. 1 and 2 of the present proposal.

[44] See supra note 27.

telecommunication assistance as envisaged in the convention.[45] It would also accord with the contemporary reality that a significant portion of the operational component of disaster relief operations is undertaken by non-governmental organizations.

29. Since existing international human rights obligations apply in the context of natural disasters, subject to the possibility of derogation in the situation of emergencies to the extent permissible under applicable international law, it may also be necessary to consider the human rights implications of the plight of victims of such disasters, particularly as regards the right to protection and access to disaster relief and basic needs. This may be limited to a reaffirmation of the affected State's obligation to respect and ensure the human rights of all individuals within its territory. Such reaffirmation may also be a factor in determining the emphasis to be placed on the scope of the topic *ratione personae*.

(b) Definitions

30. Defining the main concepts to be covered by a future text would be an important component of the work to be undertaken. Defining the terms "natural disaster" and "natural hazards"[46] would serve to distinguish other types of disasters, such as "technological disasters".

31. Examples of terms that have been defined in various texts relating, *inter alia*, to the provision of disaster relief include: "disaster relief personnel", "possessions of disaster relief personnel", "relief consignment", "United Nations relief operation", "international disaster relief assistance", "assisting State or organization", "receiving State", "transit State", "military and

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[45] Similarly, in the context of the protection regime established by the United Nations Convention on the Safety of United Nations and Associated Personnel, supra note 10, the General Assembly in resolution 58/82 of 9 December 2003, *inter alia*, took note of the development by the Secretary-General of a standardized provision for incorporation into the agreements concluded between the United Nations and humanitarian non-governmental organizations or agencies for the purposes of clarifying the application of the Convention to persons deployed by those organizations or agencies. See document A/58/187.

[46] The Hyogo Framework for Action 2005-2015, supra note 29, places emphasis on the reduction of vulnerability and risk to a "hazard" which is defined as "[a] potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation. Hazards can include latent conditions that may represent future threats and can have different origins: natural (geological, hydrometeorological and biological) or induced by human processes (environmental degradation and technological hazards)", note 2.

civil defence assets", "relief supplies", "relief services", "disaster mitigation", "disaster risk", "health hazard", "non-governmental organization", "non-State entities", and "telecommunications".

32. In addition, consideration might be given to the inclusion of specific technical terms relating to particular operational aspects of disaster relief, to the extent that it is decided to deal with such matters.

(c) Core principles

33. A number of core principles underpin contemporary activities in the realm of the protection of persons in the event of disasters. Many are a reflection of existing principles for humanitarian assistance, i.e. applicable in a context not limited to disaster relief for emergencies arising out of natural disasters, but nonetheless equally applicable. Others are taken from other fields such as international human rights law. While General Assembly resolution 46/182 of 19 December 1991, which adopted, *inter alia*, a set of Guiding Principles for emergency humanitarian assistance, is widely regarded as the key instrument, other similar pronunciations of principles also exist.[47] All share a common appreciation for the importance of humanitarian assistance for the victims of natural disasters and other emergencies.

34. Such principles include:[48]

- *The principle of humanity* - human suffering is to be addressed wherever it exists, and the dignity and rights of all victims should be respected and protected;
- *The principle of neutrality* - the provision of humanitarian assistance takes place outside of the political, religious, ethnic or ideological context;

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[47] See, for example, The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, supra note 26.

[48] Without prejudice to the applicability of some of the principles at a more general level.

- *The principle of impartiality* - the provision of humanitarian assistance is based on needs assessments undertaken in accordance with internationally recognized standards, giving priority to the most urgent cases of distress and in accordance with the principle of non-discrimination;

- *The principle of full respect for the sovereignty and territorial integrity of States, in accordance with the Charter of the United Nations* - humanitarian assistance is provided with the consent of the affected country;

- *The principle of access* - States whose populations are in need of humanitarian assistance are to facilitate the work of intergovernmental and non-governmental organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which unrestricted access to affected areas and victims is essential;

- *The principle of non-discrimination* - The provision of relief is to be undertaken without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, age, disability or other status;

- *The principle of accountability* - humanitarian assistance agencies and other entities providing humanitarian assistance are accountable to the people they assist and to those from whom they accept resources;

- *The principle of cooperation* - international cooperation[49] should be provided in accordance with international law and respect for national laws;

- *The principle of protection* - it is the primary responsibility of each State to take care of the victims of natural disasters and other emergencies occurring on its territory;

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[49] Both among States and between the affected State and the entities involved in the international humanitarian relief operation.

- *The principle of security* - The safety and security of humanitarian staff and their cargo and property is the basis upon which such assistance is provided;

- *The principle of prevention* - States are to review existing legislation and policies to integrate disaster risk reduction strategies into all relevant legal, policy and planning instruments, both at the national and international levels, in order to address vulnerability to disasters;

- *The principle of mitigation* - States are to undertake operational measures to reduce disaster risks at the local and national levels with a view to minimizing the effects of a disaster both within and beyond their borders.

35. It would have to be considered both the extent to which these principles are reflections of existing specific legal obligations of States and rights of individuals or whether they apply at a more general level.

(d) Specific provisions

36. It is proposed that the Commission would also consider a number of specific legal questions relating to the operational aspects of the provision of disaster relief. These would not be limited to lacunae in the current legal framework. Instead, the approach would be more holistic, with a view to covering most of the legal aspects of the activities being undertaken in this area - even if only at a generalized level.

37. The following appendix sets out an outline of the issues that would require consideration in any legal instrument in this field.

Appendix

Proposed outline

1. General Provisions
    a. Scope of application
    b. Definitions

2. Applicable Principles

  a. Humanity
  b. Neutrality
  c. Impartiality
  d. Sovereignty and territorial integrity of States, in accordance with the Charter of the United Nations
  e. Access
  f. Non-discrimination
  g. Accountability
  h. Cooperation
  i. Protection
  j. Security
  k. Prevention
  l. Mitigation

3. Disaster relief and protection

  a. Right of victims to protection, safety and security
  b. Right of victims to access to disaster relief and basic needs
  c. Obligation of receiving State to protect disaster relief staff, their property, premises, facilities means of transport, relief consignments and equipment to be used in connection with the assistance

4. Provision of disaster relief

  a. Conditions for the provision of assistance
  b. Offers and requests for assistance
  c. Coordination
  d. Communications and exchange of information
  e. Distribution and use of relief assistance
  f. Costs relating to disaster response operations
  g. Conformity with national laws, standards and regulations

h. Liability

i. Insurance

5. Access

a. Staff

(i) visas, entry and work permits

(ii) recognition of professional qualifications

(iii) freedom of movement

(iv) status

(v) identification

(vi) privileges and immunities

(vii) notification requirements

b. Relief consignments

(i) customs, duties, tariffs and quarantine

(ii) status

(iii) transportation and transit of goods

(iv) notification requirements

(v) identification

6. Disaster prevention and risk reduction

a. Early warning

b. Coordination activities

c. Training and information exchange

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Annex D

Protection of personal data in transborder flow of information

(Secretariat)

1. It is proposed that the International Law Commission consider including the topic "Protection of personal data in the transborder flow of information" in its long term programme of work.

A. Nature of the problem

2. Data collection or storage is not a new phenomenon. Public institutions and private entities, including natural and legal entities have collected and kept data and records since time immemorial.[1] However, the radical and unimaginable changes brought about by advances in science and technology since the Second World War[2] and more particularly in information and communication technologies (ICTs)[3] from the 1960s have redefined ways in which information and personal data are generated, collected, stored, filed, disseminated, and transferred. In particular, the Internet has proved a powerful global information infrastructure transcending the traditional physical boundaries, thereby challenging traditional conceptions of State sovereignty.[4] The electronic movement of data between States has become easier, cheaper, almost instantaneous and omnipresent. The time and space have been reduced remarkably. The data generated is detailed, processable, indexed to the individual and permanent.[5] The various actors - Governments, the industry, other businesses and organizations and individual users - increasingly depend on ICTs for the provision of essential goods and services, the conduct of

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[1] Daniel J. Solove, "Privacy and Power: Computer Databases and the Metaphors for Information Privacy", *Stanford Law Review*, vol. 53 (2000-2001), pp. 1393-1462 at p. 1400 notes that in the 11th C. William the Conqueror collected information about his subjects for taxation purposes. Many if not all States now conduct censuses periodically during which a variety of questions about personal details are requested.

[2] *Ibid.*, p. 1402. The emergence of the mainframe computer in 1946 revolutionalized the collection of information.

[3] These include computers, cameras, sensors, wireless communication, GPS, biometrics, remote sensing and other technologies.

[4] Joshua S. Bauchner, "State sovereignty and the globalizing effects of the Internet: A Case Study of the Privacy debate", *Brooklyn Journal of International Law*, vol. 26 (2000-2001), p. 1.

[5] Jerry Kang, "Information Privacy in Cyberspace Transactions", *Stanford Law Review*, vol. 53 (1997-1998), at p. 1199.

business and the exchange of information in a multitude of activities of human endeavour.[6] On a daily basis, personal data are collected in respect of individuals, for a variety of reasons, by various means and by a panoply of actors and kept by them in the public and private sectors.[7] When such data is shared or circulated by different actors serious questions about the respect of the individual's right to privacy have arisen although these concerns are not new.[8]

3. Public policy concerns over the invasion of privacy have ratcheted the debate as new technologies have made identification and tracing of sources easier.[9] Improved technology in data surveillance, digital audio technology (DAT), integrated services digital network (ISDN), digital telephones, including cell-phone location data, DNA and biometrics, black boxes, Radio Frequency Identification (RFID) chips and implantable Global Positioning System (GPS) chips and their wide accessibility have commentators and civil libertarians warning, in Orwellian metaphor,[10] of the risk of turning into a surveillance society.[11]

4. Not surprisingly, the international community, most recently the World Summit on Information Society (WSIS), has expressed concerns in the confidence and security in the use of ICTs and has sought ways to strengthen the "trust framework", including through the

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[6] General Assembly resolution 57/239 of 20 December 2002 on the Creation of a global culture of cyber security. See also General Assembly resolution 59/220 of 15 February 2005. The 2000 Ministerial Declaration of the High-level segment submitted by the President of ECOSOC, *Official Records of the General Assembly, Fifth-fifth session*, Supplement 3 (A/55/3/Rev.1), chap. III, para. 6.

[7] For example, information stored in computerized data files affecting individuals is available concerning banking, payroll, travel records, social security, insurance, as well as various subscriptions to membership clubs, newspapers and all other mundane social activities are now easily filed and processed.

[8] The possibility that privacy issues may arise in horizontal relationships between natural persons or legal persons *qua* natural persons seems to distinguish the contemporary concerns from those of earlier decades when the vertical relationship concerns between the State and private individuals were dominant, see generally report of the Secretary-General *on the Uses of electronics which may affect the rights of the person and the limits which should be placed on such uses in a democratic society*, document E/CN.4/1142 and Add.1-2 (1973). See also report of the Secretary-General on the *Respect for the privacy and integrity and sovereignty of nations in the light of advances in recording and other techniques*, document E/CN.4/1116 and Corr.1 and Add.1-3 (1974).

[9] See generally, Steven Hetcher, "Changing the Social meaning of privacy in Cyberspace", *Harvard Journal of Law and Technology*, vol. 15 (2001-2002), pp. 149-209. See also Asian-Pacific Economic Cooperation (APEC) Privacy Framework, para. 1. It may be noted that the increase in interconnectivity has also exposed information systems and networks to a growing number and wider variety of threats and vulnerabilities heightening calls for cyber security. Computer hackers have challenged the integrity of the networks. The Internet has been employed to engage in hate speech and different forms of criminality, including child pornography and identity theft.

[10] George Orwell, Nineteen eighty-four (1949), in his use of the metaphor of "Big Brother".

[11] ACLU report by Jay Stanley and Barry Steinhardt, "Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society" (2003) available at http://www.aclu.org/Privacy/Privacylist.cfm?c=39. (visited on 16 March 2006).

enhancement of the protection of personal information, privacy and data.[12] Moreover, an appeal has been made to the United Nations to prepare a legal binding instrument which sets out in detail the rights to data protection and privacy as enforceable human rights.[13]

5. Sceptics have questioned whether there was no more a law of "cyberspace" than there is a "law of the horse."[14] This debate - whether the cyberspace can or should be regulated - has essentially waned and is largely a historical milestone.[15] Nevertheless, a number of themes emerge and one of them has been what rights and expectations do the users of the electronic and digital space have by virtue of their participation in cyberspace and their increasing reliance on ICTs?[16] Three different legal responses are discernible in dealing with computer-related

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[12] World Summit on the Information Society, Outcome Documents, Geneva 2003 - Tunis 2005. The World Summit (WSIS) was held in two phases in Geneva 10-12 December 2003 and in Tunis 16-18 November 2005. The Geneva Declaration of Principles, the Geneva Plan of Action, the Tunis Commitment and the Tunis Agenda for the Information Society constitute the Outcome Documents and are available at http://www.itu.int/wsis (visited on 16 March 2006).

[13] Montreux Declaration on the Protection of personal data in a globalised world: a universal right respecting diversity, adopted by Data Protection and Privacy Commissioners assembly in Montreux for their 27th International Conference, 14-16 September 2005, available at http://www.privacyconference2005.org. See also the interest in the subject as reflected in paragraph 51 of the Declaration of the Heads of Governments and States of Countries which share French language at their Summit in Ouagadougou, November 2004:

> «Nous sommes convenus d'attacher une importance particulière à la protection des libertés et des droits fondamentaux des personnes, notamment de leur vie privée, dans l'utilisation des fichiers et traitements des données à caractère personnel. Nous appelons à créer ou consolider les règles assurant cette protection. Nous encourageons la coopération internationale entre les autorités indépendantes chargées dans chaque pays de contrôler le respect de ces règles.»

The Internet Governance Forum has also identified data protection as one of the issues requiring discussion, see generally http://www.intgovforum.org. (visited on 7April 2006).

[14] Frank H. Easterbrook, "Cyberspace and the Law of the Horse", *University of Chicago Legal Forum*, (1996), pp. 207-216.

[15] Raymond S.R. Ku, Michele A. Faber, Arthur J. Cockfield, *Cyberspace Law: Cases and Materials* (New York: Aspen Law and Business, 2002), p. 37 quoted by Van N. Nguy, "Using Architectural Constraints and the Game Theory to Regulate International Cyberspace Behaviour", *San Diego International Law Journal*, vol. 5, (2001), 431 at 432.

[16] Other themes relate to governance: who should govern and ergo regulate the electronic and digital space offered by improved ICTs and how should this electronic and digital space be regulated and what tools can be applied to regulate it? Generally, the discursive response to the governance of electronic and digital space among the various actors has taken one of the following three positions: (a) a more traditional Statist approach, with the Government as the main regulator of Internet and ICT activities; (b) a *laissez faire* approach that perceives the Internet and ICT activities as a new social frontier where the traditional rules are inapplicable and inappropriate; instead self-rule and self-regulation are the dominant operational mantras; and finally (c) a more internationalist posture. The latter approach considers the global and interconnected nature of the Internet and the emergence of an information society as much more suited for regulation by international law. These responses overlap, interrelate and are mutually reinforcing. See generally, Viktor Mayer-Schönberger, "The Shape of Governance: Analysing the World Internet Regulation", *Virginia Journal of International Law*, vol. 43 (2002-2003), who suggests these three types of cyber-law discourses and terms them as (a) the State-based traditionalist discourse; (b) the Cyber-separatist

problems.[17] Evidently, these responses are not so easily distinguishable and there are overlaps. In the first place, the existing law has often been applied to new situations; secondly, the existing law may not be adequate but is nevertheless adapted and applied to respond to new situations; thirdly, new problems demand the creation of new law.[18] In this law of cyberspace, various fields of law have been applied or adapted for application to address problems posed by ICTs.[19] On the one hand, the law of contracts, torts, evidence, intellectual property, or conflict of laws, is germane in resolving questions posed by the application and use of ICTs; and on the other, data protection has emerged as an example of the third type of legal response: A new law to be applied to a new situation.[20] The present proposal focuses on this aspect. Data protection is defined as the protection of the rights and freedoms and essential interests of individuals with

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discourse; and (c) the Cyber-Internationalist discourse and provides a critique of each of these approaches. The other theme is how should this electronic and digital space be regulated and what tools can be applied to regulate it?

[17] Frits W. Hondius, "Data Law in Europe", *Stanford Journal of International Law*, vol. 16 (1980), p. 87 at 88. The four kinds of constraints on human behaviour in ordinary life - the real space, namely the law, social norms, the market and the "architecture," have all been deployed and interplay and interact in providing an analytical understanding of the law of the "cyberspace". Typically, the various actors involved in the transborder flow of data have used these tools to provide regulation at different levels. For example, the Government may pass a law on privacy and the providers of transmission lines and facilities may agree on a framework for technical compatibility standards, tariffs and protocols; the service providers may have their own privacy code; the users may conduct themselves in accordance with certain Internet etiquette; and the manufacturers may agree on certain codes by which compatibility and networking is assured. See generally, Lawrence Lessig, "The Law of the Horse: What Cyberlaw might teach", *Harvard Law Review*, vol. 113 (1999-2000), pp. 501-549 at p. 509 who defines the architecture as "the physical world as 'we find it' or 'how it has been made'. The architecture of the cyberspace is its code - the software and the hardware that make the cyberspace the way it is".

[18] *Ibid.*

[19] The International Telecommunications Union (ITU) focuses on the institutional infrastructure and technical functioning of transborder flows of data and other organizations are involved in the elaboration of standards for data processing, data transmission and data safety, see Michael Bothe "Data, Transborder flow and Protection," *Encyclopedia of Public International Law*, Vol. One (North - Holland, Amsterdam, London, New York, Tokyo: 1992), pp. 950-961 at p. 954. UNCITRAL adopted in 1985 a recommendation on the Legal Value of Computer Records, endorsed in General Assembly resolution 40/71 of 11 December 1985. See also United Nations Convention on the Use of Electronic Communications in International Contracts, General Assembly resolution 60/21 of 23 November 2005. See for example also European Parliament and of the Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and the United States Digital Millennium Copyright Act of 1998.

[20] Frits W. Hondius, "Data Law in Europe, supra note 17, p. 88.

respect to the processing of personal information relating to them, particularly in situations where ICTs aid the processing procedures.[21] Data protection aspires to ensure that the data is not abused and that the data-subjects have and retain the ability to correct errors.[22]

B. Brief survey of existing norms and rules

6. Data protection has been a concern of the international community since the late 1960s.[23] The general orientation has been to assure the free flow of information.[24] This general disposition has implications for the flow of international trade, protection of intellectual property and the protection of human rights, in particular the right to privacy. The various approaches taken by States or the industry tend to accentuate the differences in emphasis attached to the various values. A variety of binding and non-binding instruments, national legislations and judicial decisions regulate this area. Earlier efforts within the United Nations, the Council of Europe and the OECD culminated in the adoption of "first generation" instruments and provided synergies at the domestic level in the promulgation of "first generation" legislation, beginning in the 1970s.[25] These instruments recognize as the basic issue the conflict between the ideal of data

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[21] *Ibid.*, at p. 89.

[22] Bradley P. Smith, Book Review "Policing across Natural Boundaries", *Yale Journal of International Law*, vol. 20 (1995), p. 215, at pp. 216-217.

[23] Paragraph 18 of the Proclamation of Tehran and resolution XI concerning human rights and scientific and technological developments of 12 May 1968 adopted by the International Conference on Human Rights expressed concern that recent scientific discoveries and technological advances, while opening vast prospects for economic, social and culture progress, may endanger the rights and freedoms of individuals and peoples. In its resolution 2450 (XXIII) of 19 December 1968, the General Assembly invited the Secretary-General to undertake a study of the problems in connection of human rights arising from developments in science and technology. See the reports referred to in supra note 8. The Commission on Human Rights was eventually seized with the matter. See for example Commission on Human Rights resolution 10 (XXVII) of 18 March 1971. The Council of Europe established the Committee of Experts on the Harmonization of the Legal means of programming data into computers in 1968 and the also constituted within the OECD was its first expert group, the Data Bank Panel in 1969. The subsequent one, the Group of Experts on Transborder Data Barriers and Privacy Protection, was established in 1978.

[24] The right to seek, receive and impart information and ideas regardless of frontiers is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, as well as regional human rights instruments: Article 19 of the UDHR, article 19 of the ICCPR. See also article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950; article 13 of the American Convention on Human Rights, San Jose, 1969; article 9 of the African Charter on Human and People's Rights; the Concluding Document of Vienna Meeting 1986 of representatives of the participating States of the conference on Security and Cooperation in Europe, paragraphs (34)-(46); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (1990), part II, paragraph 9; Document of the Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (1991), part II, paragraph 26; article 23 of the Cairo Declaration on Human Rights in Islam.

[25] The Council of Europe first adopted a resolution on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector in 1973, Council of Europe resolution 73 (22)(1973) and later another

protection and the ideal of free flow of information between States.[26] The State of Hesse in Germany was the first to enact general data protection legislation in 1970,[27] while Sweden was the first country to do so in 1973.[28] Some other States elected to adopt more sectoral subject-specific legislation.[29]

7. Disparities and divergences in the implementation of the "first generation" legislation prompted action and further developments within the context of the European Union, and elsewhere. These led to the subsequent adoption of "second generation" instruments,[30] some of

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resolution on the protection on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector, Council of Europe resolution 74 (29) (1974). The OECD adopted the Guidelines on the Protection of Privacy and Transborder flows of Personal data in 1980 and the Council of Europe adopted the Convention for the Protection of Individuals with regard to Automatic processing of Personal data in 198[0]1. The efforts within the United Nations took longer to maturate. The Commission on Human Rights in its resolution 10B (XXXIII), of 1977 requested the Sub-Commission on Prevention of Discrimination and Protection of Minorities to engage in a second study on relevant guidelines in the field of computerized personal files. Mr Louis Joinet (France) served as the Special Rapporteur of the Sub-Commission. The report recommended for consideration possible options for preparing minimum standards to be established by national and international legislation. In resolution 45/95 of 14 December 1990, the General Assembly adopted the United Nations Guidelines concerning computerized personal data files, contained in ECOSOC Resolution 1990/38 of 25 May 1990. For follow-up developments concerning the implementation of the guidelines, see for example document E/CN.4/1995/75, prepared pursuant to decision 1993/113 of 10 March 1993; document E/CN.4/1997/67, prepared pursuant to decision 1995/114 of 8 March 1995; and document E/CN.4/1999/88 prepared pursuant to decision 1997/122 of 16 April 1997. In its decision 1999/109 on 28 April 1999, the Commission on Human Rights, decided, without a vote: (a) To remove the question from its agenda, since the applicable guidelines are progressively being taken into consideration by States; (b) To request the Secretary-General to entrust the competent inspection bodies with the task of ensuring the implementation of the guidelines by the organizations concerned within the United Nations system.

[26] Jon Bing, "The Council of Europe Convention and the OECD Guidelines on Data Protection", *Michigan Yearbook of International Legal Studies*, vol. 5 (1984), p. 271 at 273.

[27] Data protection derives its name from German "Datenschutz". Sweden: *Data Act* of 1973 (*Datalagen*, 1973:289), in force 1 July 1974. See also for example, Norway: *Personal Data Registers Act* of 1978 ((*lov om personregistre mm av 9 juni 1978 nr 48*), in force 1 January 1980; Denmark: *Private Registers Act* of 1978 (*lov nr 293 af 8 juni 1978 om private registre mv*) and *Public Authorities' Registers Act* of 1978 (*lov nr 294 af 8 juni 1978 om offentlige myndigheders registre*), both in force 1 January 1979; Canada: Human Rights Act 1977; 1982 Federal Privacy Act; Germany: Federal Data Protection Act, "Bundesdatenschutzgesetz (BDSG)" 1977; France: Act 78-17 of 6 January 1978 concerning Data Processing, Files and Liberties; United Kingdom: Data Protection Act 1984.

[28] Jon Bing, "The Council of Europe Convention and the OECD Guidelines …", supra note 26, p. 271.

[29] In the United States, the following legislation were for example passed: Privacy Act, Pub. L. No.93-579 (1974); Fair Credit Reporting Act, Pub. L. No. 91-508 (1970); the Right to Financial Privacy Act, Pub. L. No. 95-630 (1978); Cable Communication Policy Act, Pub. L. No. 98-549 (1984); Family Educational Rights and Privacy Act, Pub.L. 93-380, 1974.

[30] Article XIV, on general exceptions, of the 1994 WTO General Agreement on Trade in Services, envisages, *inter alia*, the possible adoption of enforcement of measures (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: … (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts. See also the 1995 European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the

which like the EU Directive have implications for third States,[31] and "second generation" legislation.[32] Efforts have also been made to promote the enactment of legislation on the basis of

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free movement of such data, which provides a detailed privacy regulatory structure intended to be adopted by EU member States domestically. *Official Journal* L.281 of 23 November 1995. In 2001: 2001 Council of Europe, Additional Protocol to the 1981 Convention; 2002 EU Parliament and Council Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in electronic communications sector. It repeals the earlier 1997 European Parliament and Council Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. See also 2006 EU Parliament and Council Directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending directive 2002/58/EC. Article 8 of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000, (not yet into force), contains a specific provision on the protection of personal data:

> 1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority.

The Asian-Pacific Economic Cooperation (APEC) in 2004 also adopted an Asian-Pacific Economic Cooperation Privacy Framework to promote a consistent approach in information privacy as a means of ensuring the free flow of information in the Asia Pacific region.

[31] Article 25 addresses the transfer of personal data to third countries on the basis of adequate level of protection and article 26 sets forth circumstances in which derogations are permissible. In response to the EU Directive, the Department of Commerce adopted Safe Harbour Privacy Principles encouraging companies to cooperate. Safe Harbour Privacy Principles, issued by the United States Department of Commerce on 21 July 2000, available at http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm (visited on 24 March 2006). EC Commission decision 2000/520/EC recognized these principles as providing adequate protection. The adequacy of the level of protection appertaining to the transfer of data to the United States is a matter on which the Court of Justice of the EC has rendered a judgment on 30 May 2006, joined cases C-317/04 and C-318/04. The European Parliament *inter alia* sought the annulment of EC Commission decision (2004/535/EC of 14 May 2004) which authorized the transfer of air Passengers Name Records (PNR) data to United States Bureau of Customs and Border Protection. Case C-317/04 and C-318/04. The Court annulled the decision of the Council on a technicality that the matter fell out of community competence.

[32] Argentina: Personal Data Protection Act "Ley de Proteccion de los Personales (Act 25.326) of 4 October 2000; Australia: 1988 Privacy Act and the 2000 Privacy Amendment Act (private sector); Austria: Personal Data Protection Act 17 August 1999 and Landers' legislations to implement the EC Directive; Brazil: Anteprojeto de Lei No. 61/1996; Anteprojeto de Lei No. 151; Belgium: Law on Privacy Protection in relation to the Processing of Personal Data, 8 December 1992, modified by the implementation law of 11 December 1998 and Secondary Legislation of 13 February 2001; Canada: the 2001 Personal Information Protection and Electronic Document Acts (PIPEDA); Chile: Ley No. 19.628, Sobre la Proteccion de la Vida Privida, 28 August 1999; Cyprus: The Processing of Personal Data (Protection of the Individual) Law of 2001, as amended in 2003 and the Regulation of Electronic Communications and Postal Services Law of 2004; Czech Republic: Personal Data Protection Act, 4 April 2000; Denmark: Act on Processing of Personal Data (Act No. 429), 31 May 2000, Germany: Federal Data Protection Act (Bundesdatenschutzgesetz), 18 May 2001 and Landers' Data Protection laws adopted to implement the European Directive; Estonia: Data Protection Act, 12 February 2003; Finland: Finnish Personal Data Act (523/1999), 22 April 1999, as Amended on 1 December 2000 and Finnish Data Protection Act in Working Places of 2004; France: Law 2004-801 modifying law 78-17 of 6 January 1978; Greece: Implementation Law 2472 on the Protection of individuals with regard to the processing of personal data entered into force 10 April 1997; Ireland: Data Protection Act 1998, amended by Data Protection Act 2003, 10 April 2003; Hungary: Act LXIII on the Protection of Personal Data and Public Access to Data of Public Interest of 1992, Act IV of 1978 on the Criminal Code on Misuse of personal data and misuse of personal information and Data Protection Act , 14 December 2001 (Act XXVI) as amended by Act XXXI of 2002; Italy: Protection of individuals and other subjects with regard to the

model legislation prepared in a multilateral framework.[33] Some other States remain disposed towards the enactment of sectoral subject-specific legislation.[34] The preferred options taken by States are deeply embedded in historical, legal and political traditions.[35] More generally, the laws adopted within the European context establish limits on the collection of data.[36] They require *ex ante* notification of purposes for which the data are required. Moreover, any subsequent use of the data, unless authorized by the consent of the data subject or otherwise provided by law must accord with the specified purposes. Secondly, the legislation imposes controls *ex post,* aimed at ensuring the continued reliability of the data. Notification about the

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processing of personal data Act No. 675, 31 December 1996 and New Data Protection Code entered into force 1 January 2004; Israel: Data protection Law enacted in 1981 and amended in 1996; Japan: the Act of the Protection of Personal Information, Law No. 57 of 2003; Latvia; Personal Data Protection Law Amended by Law of 24 October 2004; Lithuania: Law on Legal Protection of Personal Data, 21 January 2003, No IX-1296, with Amendments of 13 April 2004; Luxembourg: Data Protection Law, 2 August 2001; The Netherlands: Personal Data Protection Act, 6 July 2000 (the former sectoral Codes of conduct are under review to become legislations); New Zealand: Privacy Act, 1 July 1993; Poland: Act on the Protection of Personal Data, 29 August 1997 amended on 1 January 2004; Paraguay: Data protection law in Paraguay, Act No. 1682 Regulating Private Information; Portugal: Personal Data Protection Law 67/98 of 26 October 1998; Republic of Korea: Act on the Protection of Personal Data maintained by Public Agencies Act (Act No. 4734) of 1994, the Act on the Promotion and Protection of Information Infrastructure, (Act No. 5835) of 1999; Russian Federation: Law of the Russian Federation on Information, computerization, and Information Protection of 25 January 1995; Slovenia: 1999 Personal Data Protection Act (based on Council of Europe Convention) and Act Amending the Personal Data Protection Act in July 2001; Slovakia: Act No. 428/2002 coll. on Protection of Personal Data, as Amended by the Act No. 602/2003 Coll., Act No. 576/2004 Coll. and the Act No. 90/2005 Coll.; Spain: Ley Organic 15/1999 de Proteccion de Dates de Caracter Personal, 13 December 1999; Sweden: Personal Data Act 1998: 204 of 29 April 1998 and Regulation 1998:1191 of 3 September 1998; Switzerland: Swiss Federal Act on Data Protection 235.1 (DPA) of 19th June 1992; Tunisia: Personal Data Protection Law No 2004-63, 27 July 2004; United Kingdom: Data Protection Act of 16 July 1998 completed by legislation of 17 February 2000.

[33] The 2002 Meeting of the Commonwealth Law Ministers Conference in Kingston, St. Vincent and Grenadines, proposed two draft models bills on privacy, (for the private and the public sectors). The model law was influenced by the Canadian system of personal data protection, the 1998 United Kingdom Data Protection Act which implement the EU Directive, as well as the OECD Guidelines.

[34] In the United States, the following legislation were passed: Privacy Act, 5 U.S.C.§552a (2001); Fair Credit Reporting Act, 15 U.S.C. §1681 (2001); Video Privacy Protection Act, 18 U.S.C.§2710-11 (2000); Cable Communications Policy Act, 20 U.S.C.§ 551 (2000); Drivers Privacy Protection Act, 18 U.S.C.§ §2721-2725 (2000); Telephone Consumer Protection Act, 47 U.S.C. §227 (2000); Family Educational Rights and Privacy Act, 20 U.S.C.§1232 (2000); Health Insurance Portability and Accountability Act, Pub. L. no, 104-191 (1996); Children On-line Privacy Protection Act, 15 U.S.C. §6501-06 (2000).

[35] Frits W. Hondius, "Data Law in Europe", supra note 17, pp. 87-110. States have adopted either a single piece of legislation covering both the public and the private sectors equally (e.g. European Union Member States, Argentina, Chile, Israel, Switzerland, the Russian Federation); a single Act addressing the public and private sectors in separate chapters or two separate Acts covering the public and private sectors separately (e.g. Australia; Canada; Paraguay; Tunisia); or an Act covering the Public sector and separate pieces of legislation for various aspects of private sector activities (for example Japan); Republic of Korea. In some instances, general legislation is accompanied by alternative codes of conduct for various sectors (e.g., New Zealand).

[36] G. Michael Epperson, "Contracts for Transnational Information Services: Securing Equivalency of data Protection," *Harvard International Law Journal*, vol. 22, (1981) p. 157 at p. 162.

existence of such data records, access and an opportunity to make corrections to erroneous data are elements of such reliability.[37] Thirdly, such legislation regulates aspects concerning security and protection of such data by making provision for storage and usage, including procedures for securing against loss, destruction and an unauthorized disclosure. Any use or disclosure must be recorded and the data-subject notified in the event of any unauthorized use or disclosure.[38] A framework is established to address these matters. Fourthly, a regime for grievance and redress is also contemplated.

8. On the other hand, the approach particularly in the United States is sectoral, relying on a combination of legislation, regulation and self regulation;[39] and the responses are more market driven. The legislation covers essentially the public sector or specialized areas of it; the data-subjects afforded protection are citizens and resident aliens. Moreover, there is no single agency charged with questions of enforcement.

9. It may also be noted that the industry has taken an active role in adopting self-regulatory codes to protect personal data.[40]

10. Case law has also recognized the importance of data protection. The European Court of Justice in the *Fisher case* has confirmed that principles of data protection constituted general principles of Community law. It asserted that the EU Directive 95/46/EC adopted, at the Community level, general principles which already formed part of the law of Member States in the area in question.[41] In *Rechnungshof*, the Court noted that the provisions of the Directive,

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[37] *Ibid.*

[38] *Ibid.*

[39] Comments of the United States of America on Internet Governance, Released by the Bureau of Economic and Business Affairs, August 15, 2005: *Data Protection and Privacy:* … Any effective approach to ensuring protection of personal information includes: appropriate laws to protect consumer privacy in highly sensitive areas such as financial, medical, and children's privacy; government enforcement of these laws; and encouragement of private sector efforts to protect consumer privacy, available at >http://www.state.gov/e/eb/rls/othr/2005/51063.htm>. (visited at 21 March 2006).

[40] The International Chamber of Commerce is playing a lead role in this regard. See for example its Toolkit for Policy makers, at http://www.iccwbo.org/home/e_business/word_documents/TOOLKIT-rev.pdf.

[41] *Case No. C-369/98 R .v. Minister of Agriculture, Fisheries and Food ex parte Fisher, ECJ Judgment of 14 September 2000.*

insofar as they govern the processing of personal data liable to infringement, in particular the right to privacy, must necessarily be interpreted in the light of the fundamental rights, which form an integral part of the general principles of community law. It also deemed that:

> Articles 6 (1) (c) and 7 (c) and (e) of Directive 95/46 are directly applicable, in that they may be relied on by an individual before the national courts to oust the application of rules of national law which are contrary to those provisions.[42]

The European Court of Human Rights has expressly recognized the protection of personal data as a fundamental right as it is included in the right to privacy established under article 8 of the European Convention.[43]

11. The international binding and non-binding instruments, as well as the national legislation adopted by States, and judicial decisions reveal a number of core principles, including: (a) lawful and fair data collection and processing; (b) accuracy; (c) purpose specification and limitation; (d) proportionality; (e) transparency; (f) individual participation and in particular the right to access; (g) non-discrimination; (h) responsibility; (i) supervision and legal sanction; (j) data equivalency in the case of transborder flow of personal data; (k) the principle of derogability.

C. Elaboration of proposal for consideration of the Commission

12. The objective of the present proposal would be to elaborate general principles that are attendant in the protection of personal data. The overview of existing norms and rules suggests that although there are differences in approach, there is a commonality of interests in a number of core principles. The precedents, and other relevant material, including treaties, national legislation, judicial decisions and non-binding instruments point to the possibility of elaboration of a set of provisions that flesh out the issues relevant in data protection in light of contemporary practice. Such an exercise would assist in facilitating the preparation of a set of internationally

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[42] *In Rechnungshof ... in joined cases C-465/00, C-138/01 and C-139/01, ECJ Judgment of 20 May* (Reference for a preliminary ruling from the Verfassungsgerichtshof and Oberster Gerichtshof): Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others and between Christa Neukomm (C-138/01), Joseph Lauermann (C-139/01) and Österreichischer Rundfunk (2003/C 171/03), para. 101.

[43] See also *Amann v. Switzerland*, 27798/95 [2000] ECHR 88 (16 February 2000); *Leander v. Sweden* - 9248/81 [1987] ECHR 4 (26 March 1987); *Rotaru v. Romania* - 28341/95 [2000] ECHR 192 (4 May 2000); *Turek v. Slovakia*, 57986/00 [2006] ECHR 138 (14 February 2006).

acceptable best practices guidelines and would assist governments in the preparation of national legislation. It would also assist the industry in devising models for self regulation. The elaboration of a "third generation" of privacy principles would augur well with increasing calls for international response on this matter. Although this is an area which is technical and specialized, it is also an area in which State practice is not yet extensive or fully developed. By employing its working methods the Commission may nevertheless be able to identify emerging trends in legal opinion and practice which are likely to shape any global legal regime which would finally emerge.

Delineating the scope of the topic

13. There is a link between privacy and data protection. The right to privacy has centuries-old provenance and has attained constitutional status and recognition in many jurisdictions,[44] as well as in international binding and non-binding instruments.[45] However, the right to privacy is not absolute and its parameters and penumbras are not always easy to fathom and delineate. From philosophical and analytical perspectives, privacy conjures a variety of possibilities and ideas which may fall into one or cross-cut any of the following clusters: (a) spatial; (b) decisional; (c) informational;[46] and (d) privacy of communications.

14. Although the four clusters implicate and have a bearing on the other, the scope of the present proposal does not address the general question of privacy and would be narrower and more restricted in four respects.

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[44] For example, in 1361, the Justices of the Peace Act 34 Edw. 3 c.1 in England provided for the arrest of peeping toms and eavesdroppers; a 1776 Public Records Act of Sweden required that all information held by government be used for legitimate purposes; in the United States, in 1890, Warren and Brandeis, "The Law of Privacy", *Harvard Law Review*, vol. 4 (1890-91), p. 192 at 195, wrote that a right to privacy was "the right to be let alone". In *Griswold v. Connecticut*, 381 U.S.479 (1965), the Supreme Court gave an expansive interpretation of the Bill of Rights and averred that an individual had a constitutional right to privacy.

[45] Article 12 of the UDHR, article 17 of the ICCPR. See also articles V, IX and X of the American Declaration of the Rights and Duties of Man, Bogota, 1948; article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950; article 11 of the American Convention on Human Rights, San Jose, 1969; the African Charter on the Rights and Welfare of the Child, Addis Ababa, 1990; article 18 of the Cairo Declaration on Human Rights in Islam. Cf. also article 18 of the African Charter on Human and People's Rights. In the area of medical ethics, see for example the Nuremberg Code on Directions for Human Experimentation, the 1948 Declaration of Geneva and the 1964 Declaration of Helsinki.

[46] Jerry Kang, "Information Privacy …", supra note 5, p. 1193 at 1202-1203. In *Whalen v. Roe*, 429 U.S.589 (1977), the United States Supreme Court extended the substantive due process protection of privacy to information privacy.

15. First, its main focus is on the third cluster: the informational subset of privacy, which is concerned with the individual's control over the processing of personal information - its acquisition, disclosure and use,[47] a concept usefully referred to as "fair record management".[48] It would be necessary to consider the rights that the data subject and users possess.

16. Secondly, it would address the protection to be afforded to the means of communication, that is to say, those aspects of the fourth cluster concerning the privacy of communications insofar as there is a connection in securing informational privacy: The security and privacy of mail, telephony; e-mail and other forms of ICTs. With improved technologies, the availability of information in the public domain challenges the traditional paradigm of privacy as one "protecting one's hidden world".[49] Data security, location data and traffic data have become elements within the penumbra of protection. Data security goes to the physical security of the data; an effort that seeks to ensure that data are not destroyed or tampered with in the place where they are located. Data are also always in a state of flux and movement and easily found in the custody of third parties. Where one is located (location data)[50] and what is being sent to another (traffic data)[51] are matters whose anonymity can no longer be guaranteed. The type and nature of protection to be given to the data whether stationary or in traffic are matters that would fall within the purview of the topic. However, the protection offered has to be weighed against society's need for tools that would ensure effective law enforcement, including in combating international terrorism and organized crime.

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[47] *Ibid.*, at 1203.

[48] G. Michael Epperson, "Contracts for Transnational Information Services …", supra note 36, at pp. 160-161. "Data protection does not mean that all such privacy interests shall be fully protected. The term refers less to absolute prohibition of the accumulation and usage than to the establishment of procedures guaranteeing to data subjects the opportunity to know of the existence of data concerning them and of the uses to which such data will be put …".

[49] Daniel J. Solove, "Privacy and Power …", supra note 1, at p. 1437.

[50] The latitude, longitude and altitude of the terminal equipment of the user, the direction of travel, the level and accuracy of the location information, the identification of the network cell and the time the location information was made are easily recordable.

[51] The routing, duration, time or volume of communication, the protocol used, the location of the terminal equipment of the sender or recipient, the network on which the communication originates or terminates, the beginning, end or duration of a communication, the format of conveyance of the communication are easily identifiable pieces in the traffic of data.

17. Thirdly, it would be restricted to addressing personal data flows.[52] Transborder data flows may involve different kinds of data, such as (a) *operational data*;[53] (b) *actual financial transactions*;[54] (c) *scientific or technical information*;[55] and (d) *personally identifiable information* relating for example to credit, medical history, criminal records; travel reservations; or it may simply be a name or an identification number. Only personally identifiable data is intended to fall within the scope of the present proposal although such data may also appear in the form of operational or financial transactions,[56] as well as part of scientific and technical surveys, including demographic surveys.

18. What is personally identifiable information may bear on (a) authorship in relation to the individual; (b) a descriptive relation to the individual; or (c) an instrumental mapping in relation to the individual.[57] It is these aspects that may require protection from disclosure. Natural persons are ordinarily associated with personally identifiable information. In some States, legal persons and other entities may be affected.[58] The scope of the topic *ratione personae* would have to determine the treatment to be given to other entities other than natural persons.

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[52] Eric J. Novotny, "Transborder Data flows and International Law: A Framework for Policy-Oriented Inquiry", *Stanford Journal of International Law*, vol. 16 (1980), 141, at 144 fn. 7. "Data" and "Information" are used sometimes as synonymous terms. However, from a technical perspective:

> "Data" refers to a set of organized symbols capable of machine processing and information. "Information" implies a higher class of data intelligible to a human being. The purpose of transborder data flows is to create, store, retrieve, and use information; at times information is reduced to data for intermediate purposes.

[53] *Ibid.*, at p. 156. These are intended to support the organizational decisions or that sustain certain administrative functions.

[54] *Ibid.*, p. 157. These involve credits, debits and transfers of money.

[55] *Ibid.*, p. 158. These reflect results of experiments, surveys, environmental or meteorological measurements or economic statistics.

[56] *Ibid.*, p. 157. See also a pending case (*Segerstedt -Wiberg and others v. Sweden, Application No. 62332/00*), which was declared admissible on 20 September 2005. The ECHR will have to determine whether the collection and storage of information about individuals which are "in connection with their public activities", "already in the public domain" and which are accurate and collected on national security grounds, may constitute an infringement of the right to privacy. It also entails the right to refuse to advise the individuals concerned of the full extent of the information collected. Supreme Court of Iceland in its judgment No. 151/2003 of 27 November 2003, *Guomundsdottir v. Iceland*, addressed the question on the definition of "personal data" in the context of DNA data and questions of identifiability as linked to a relation who was deceased. See Dr. Renate Gertz, "An Analysis of the Icelandic Supreme Court judgment on the Health Sector Database Act", *Journal of Law and Technology*, vol. 1, issue 2, June 2004, pp. 290-306.

[57] Jerry Kang, "Information Privacy …", supra note 5, at pp. 1207-08.

[58] Eric J. Novotny, "Transborder Data flows and International Law …" supra note 52, at p. 157.

19. Data flows include flows among the various actors, and these may be governments, intergovernmental organizations, non-governmental organizations; and the private sector, such as multinational corporations and enterprises, some of which provide a data processing service. The span of activities in the public or private sector that may be involved would have to be taken into account in the treatment of the topic.

20. Fourthly, there are restrictions and exceptions and competing interests recognized in the protection of informational data. Indeed, the privacy protections offered by national Constitutions and in judicial decisions and international human rights instruments recognize possible restrictions and exceptions, in the form of derogations or limitations.

Definitions

21. Transborder flow of data has been defined as the "electronic transmission of data across political boundaries for processing and/or storage of [ICT] files".[59] The scope of the topic *ratione materiae* would be a matter that would require careful consideration, in particular whether it should be only automated computerized data, or any kind of data, including manually generated and processed data; whether the scope should be defined through the technology used or through any kind of data involved regardless of the technology.

22. It would be necessary to define such terms as data; data-subject; data user; data-file; data retention; data preservation; personally identifiable data; sensitive data; traffic data; location data; transborder flow of personal data; processing of personal data; communication; third party user; registration and transactional data; clickstream data. The definitions are only illustrative; they need to take into account the technological advances that are continuously taking place in the network environment.

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[59] International Barriers to Data flows, Background Report, Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-sixth Congress, First session, April, 1979, quoted in the Panel on Legal Issues of Transborder Data Transmission, ASIL *Proceedings*, vol. 74 (1980), p. 175.

Core principles

23. A number of core principles are discernible from developments in this field in almost forty-years. Such principles include the following:[60]

- *Lawful and fair data collection and processing*: This principle presupposes that the collection of personal data would be restricted to a necessary minimum. In particular such data should not be obtained unlawfully or through unfair means;

- *Accuracy*: The information quality principle is a qualitative requirement and entails a responsibility that the data be accurate, and necessarily complete and up to date for the purpose intended.

- *Purpose specification and limitation*: This principle establishes the requirement that the purpose for which the data are collected should be specified to the data subject. Data should not be disclosed, made available or otherwise used for purposes other than those specified. It has to be done with the consent or knowledge of the data-subject or under the operation of the law. Any subsequent use is limited to such purpose, or any other that is not incompatible with such purpose. Differences lie in the approaches taken by States. Some jurisdictions perceive the obligation for consent to be *ex ante*.

- *Proportionality*: Proportionality requires that the necessary measure taken should be proportionate to the legitimate claims being pursued.

- *Transparency*: Denotes a general policy of openness regarding developments, practices and policies with respect to protection of personal data.

- *Individual participation and in particular the right to access*: This principle may be the most important for purposes of data protection. The individual should have access to such data; as well as to the possibility of determining whether or not the keeper of the file has data concerning him; to obtain such information or to have it communicated to him in a form, in a manner and at a cost that is reasonable. This accords with the right of an individual to know about the existence of any data file, its contents, to challenge the data and to have it corrected, amended or erased.

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[60] See generally, Justice Michael D. Kirby, "Transborder Data flows and the 'Basic Rules' of data privacy", *Stanford Journal of International Law*, vol. 16 (1980), pp. 27-66. See also John M. Eger, "The Global Phenomenon of Teleinformatics: An Introduction", Cornell International Law Journal, vol. 14 (1981) pp. 203-236. See also Secretary's Advisory Committee on Automated Personal Data Systems, United States Department of Health, Education and Welfare, Records, Computers and the Rights of Citizens (1973).

- *Non-discrimination*: This principle connotes that data likely to give rise to unlawful and arbitrary discrimination should not be compiled. This includes information collated on racial or ethnic origin, colour, sex life, political opinions, religious, philosophical and other beliefs as well as membership of an association or trade union.

- *Responsibility*: This principle embraces data security; data should be protected by reasonable and appropriate measures to prevent their loss, destruction, unauthorized access, use, modification or disclosure and the keeper of the file should be accountable for it.

- *Independent supervision and legal sanction*: Supervision and sanction require that there should be a mechanism for ensuring due process and accountability. There should be an authority accountable in law for giving effect to the requirements of data protection.

- *Data equivalency in the case of transborder flow of personal data*: This is a principle of compatibility; it is intended to avoid the creation of unjustified obstacles and restrictions to the free flow of data, as long as the circulation is consistent with the standard or deemed adequate for that purpose.

- *The principle of derogability*: This entails power to make exceptions and impose limitations if they are necessary to protect national security, public order, public health or morality or to protect the rights of others.

Derogability

24. While privacy concerns are of critical importance, such concerns have to be balanced with other value-interests. The privacy values to avoid embarrassment, to construct intimacy and to protect against misuse associated with the need to protect the individual have to be weighed

against other counter-values against individual control over personal information; such as the need not to disrupt the flow of international trade and commerce and the flow of information; the importance of securing the truth, as well as the need to be live in secure environment.[61] There are allowable restrictions and exceptions, for example, with respect to national security, public order (*ordre public*),[62] public health or morality[63] or in order to protect the rights and freedoms of others, as well as the need for effective law enforcement and judicial cooperation in combating crimes at the international level, including the threats posed by international terrorism and organized crime.

25. The processing of personal data must be interpreted in accordance with human rights principles.[64] Accordingly, any of the objectives in the public interest would justify interference with private life if it is (a) in accordance with the law, (b) is necessary in a democratic society for the pursuit of legitimate aims, and (c) is not disproportionate to the objective pursued.[65] The phrase "in accordance with the law" goes beyond to the formalism of having in existence a legal basis in domestic law, it requires that the legal basis be "accessible" and "foreseeable".[66] Foreseeability necessitates sufficiency of precision in formulation of the rule to enable any individual to regulate his conduct.[67]

26. A number of issues still arise in the practice of States. The first relates to *data retention and data preservation*. In the cyberworld, there are two basic ways in which personal

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[61] See generally, Catherine Crump, "Data Retention: Privacy, Anonymity and Accountability Online, *Stanford Law Review*, vol. 56 (2003-2004), pp. 191-229.

[62] See e.g. 2001 Council of Europe Convention on Cybercrime in 2001 and adopted at Budapest on 23 November 2001, ETS No. 185.

[63] E.g. UNESCO adopted the Universal Declaration on the Human Genome and Human Rights 11 November 1997, endorsed by General Assembly resolution 53/152 of 9 December 1998. See also 1997 Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the application of Biology and Medicine adopted at Oviedo on 4 March 1997, ETS No.164; and 1998 Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, 12 January 1998, ETS No. 168.

[64] *Rechnungshof ... in joined cases C-465/00, C-138/01 and C-139/01, ECJ Judgment of 20 May 2003.*

[65] *Fressoz and Roire v. France*-29183/95 [1999] ECHR 1, 21 January 1999. For example when reviewing proportionality the extent to which the data affect private life is taken into account. Data relating to private intimacy, health, family life or sexuality must be protected more strongly than data relating to income and taxes, which, while also personal, concern identity to a lesser extent and are thereby less sensitive.

[66] *Amann v. Switzerland*, supra note 41, para. 55-62.

[67] *Malone v. United Kingdom*, Judgment of 2 August 1984, ECHR Series A, No. 82, pp. 31-32, para. 66.

information is collected: (i) through direct solicitation from users (registration and transactional data)[68]; and (ii) surreptitiously through tracking the way people surf the Internet (clickstream data).[69] One way in which States have used the law to monitor activities in the cyberspace for purposes of law enforcement is to promulgate *data retention* legislation.[70] Essentially, Internet service providers (ISPs) are required to clickstream, collect and store data on the activities of their customers in the cyberspace. This has raised particular concerns because it:

> "Rearchitects" the Internet from a context of relative obscurity to one of greater transparency. This manipulation of context influences what values flourish on the Internet. Specifically, data retention, by making it easier to link acts to actors, promotes the value of accountability while diminishing the values of privacy and anonymity.[71]

27. Unlike data retention, *data preservation* has a more limited remit as a tool to enable law enforcement to preserve records and other evidence in respect of a particular customer under investigation pending the issuance of a court order.[72] Protection of personal data in a form that permits identification of the data-subject may in some cases require that, once the purpose has expired, the data be destroyed, properly archived or re-identified. The longer the data are retained or the more general the edict for retention is, the higher the concerns are from a perspective of privacy in accordance with human rights principles.

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[68] Daniel J. Solove, "Privacy and Power: ...", supra note 1, at p. 1408.

[69] *Ibid.*, p. 1411.

[70] E.g. EC Commission decision 2004/535/EC of 14 May 2004. Swiss Internet service providers are legally required to record the time, date, sender ID and receiver ID of all e-mails. Spain also requires ISPs to retain some types of data on their customers for one year. See also 2006 EU Parliament and Council Directive on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending directive 2002/58/EC.

[71] Catherine Crump, "Data Retention: Privacy, ...", supra note 61, p. 194.

[72] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), establishes numerous amendments to legislation in order to increase the investigative and surveillance capacities of the law enforcement agencies in the U.S. The Wiretapping Statute, Electronic Communications Privacy Act, Computer Fraud and Abuse Act, Foreign Intelligence Surveillance Act, Family Education Rights and Privacy Acts, Pen Register and Trap and Trace Statute, Money Laundering Act, Immigration and Nationality Act Money Laundering Control Act, Bank Secrecy Act, Right to Financial Privacy Act, Fair Credit Reporting Act have been amended by the USA Patriot Act.

28. A second related aspect, has been accessibility of governments to private and public databases; the ability of the governments to purchase information on individuals for use in law enforcement from private databases. Such databases are often voluntarily compiled and shared voluntarily with governmental authorities.[73]

29. It may be necessary to identify safeguards that would assure that data retention or data preservation and accessibility to databases do not render the essence of privacy inoperable.

30. There is also a recognition of limitations in respect of use of files for statistical uses or scientific research or in respect of journalistic purposes or for artistic or literary expression. The importance of securing the truth and the importance of free flow of information necessitate that certain data files be treated differently even if it may relate to personally identifiable data. Use of files for statistical, technical or scientific research or concerning journalistic pursuits or artistic or literary expression fall in this category. The right of access to information may be restricted provided such restrictions are based on law and are must be necessary order to respect the rights and reputation of others, for the protection of national security or of public order *(ordre public)* or of public health or morals.

Data adequacy/equivalency

31. The transfer of data from one country to another State raises questions of security and protection; whether and in what circumstances transfer should occur when the other State cannot ensure adequate levels of protection; what would be the applicable law and how problems that would arise are to be implemented, etc. Accordingly, data adequacy or data equivalency issues may need some treatment within the topic.

32. The following appendix outlines, for indicative purposes only, the issues that may have to be addressed:

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[73] See generally, Daniel J. Solove, "Digital Dossiers and the Dissipation of Fourth Amendment Privacy", *Southern California Law Review*, vol. 75 (2002), p. 1083. The New York Times on Tuesday 21 March 2006, B.6, "Librarian Is Still John Doe, Despite Patriot Act Revision", notes that 30,000 national security letters are issued in a year demanding patron records. See also *John Doe; American Civil Liberties Union; and American Civil Liberties Union Foundation v. Attorney-General, et al.*, United States Southern District Court of New York, opinion, decision and order of Judge Victor Marrero.

Appendix

- **Scope:** Protection of personal data and privacy of communications
    - Scope *ratione personae*: personal data
    - Scope *ratione materiae*: private and public sectors: *quere* whether International Organizations should be included
    - *Possible exclusions:* Purely personal and house-hold activities
- **Definitions:** data; data-subject; data user; data-file; data retention; data preservation; personally identifiable data; sensitive data; traffic data; location data; transborder flow of personal data; processing of personal data; communication; third party user; registration and transactional data; clickstream data
- **Core principles:** Lawful and fair data collection and processing; accuracy; purpose specification and limitation; proportionality; transparency; individual participation and in particular the right to access; non-discrimination; responsibility; independent supervision and legal sanction; data equivalency in the case of transborder flow of personal data; derogability
- **Restrictions to right of access:** Maintenance of public order; defence and security of the State; public health, etc.
- **Confidentiality and Security:** Confidentiality of communications; security of sensitive data
- **Rights in respect of the data subject:** to be informed; to withhold consent; access; rectification; to object to processing of data for a legitimate reason; to a remedy
- **Data processing:** Fairness and lawfulness; accountability
- **Criteria for legitimate data processing:** Consent; contractual obligation; other legal obligation; necessary to protect vital interest of data subject; necessary in the public interest; necessary for the purposes of legitimate interest

- **Exceptions and limitations:** National security; defence; public security; criminal law enforcement; fiscal concerns and economic well-being; protection of data subject and others
    - Policy making (census, population registers, surveys); Scientific, research and statistics; Journalistic and artistic activities
- **Sanction and remedy:** Administrative; judicial
- **Adequacy of level of transborder protection:** principle of adequacy; determination of adequacy; derogations
- **Implementation:** Legislation; regulation; self-regulation

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Annex E

Extraterritorial jurisdiction

(Secretariat)

A. Background context

1. Traditionally the exercise of jurisdiction by a State was primarily limited to persons, property and acts within its territory and to relatively exceptional situations in which its nationals travelled beyond its borders. Today the exercise of extraterritorial jurisdiction by a State with respect to persons, property or acts outside its territory has become an increasingly common phenomenon largely as a consequence of: (a) the increase in the movement of persons beyond national borders;[1] (b) the growing number of multinational corporations; (c) the globalization of the world economy,[2] including international banking and international stock exchanges; (d) the increase in transnational criminal activities, including drug trafficking, money laundering, securities fraud and international terrorism; (e) the increase in illegal migration;[3] and (f) the increasing use of the internet across national borders for legal or illegal purposes, such as electronic contracts, e-commerce and cyber crimes.

2. The assertion of extraterritorial jurisdiction by a State is an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of the State in the absence of such regulation under international law. The exercise of extraterritorial jurisdiction by a State tends to be more

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[1] "Since 1965, the number of international migrants has doubled. As of the year 2000, there were approximately 175 million migrants throughout the world." Jean-Daniel Gerber, "Foreword", *in* Alexander T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms* (The Hague: T.M.C. Asser Press, 2003), at p. vii.

[2] "The world has been transformed by the process of globalization. States, societies, economies and cultures in different regions of the world are increasingly integrated and interdependent. New technologies enable the rapid transfer of capital, goods, services, information and ideas from one country and continent to another." *Migration in an Interconnected World: New Directions for Action*, Report of the Global Commission on International Migration, October 2005, synopsis, at p. 1, paras. 1 and 2.

[3] "An estimated 2.5 to 4 million migrants cross international borders without authorization each year." *ibid*, at p. 85.

common with respect to particular fields of national law in view of the persons, property or acts outside its territory which are more likely to affect its interests, notably criminal law and commercial law.

3. The topic "Extraterritorial jurisdiction" is in an advanced stage in terms of State practice, and is concrete. Although there appears to be a strong need for codification in this field, some may question whether the practice is sufficiently uniform or widespread to support a codification effort at this time. However, recent developments in this regard indicate that practice may be converging towards a more uniform view of the law. Moreover, innovations in communications and transportation make the codification and progressive development of the limits of the extraterritorial jurisdiction of States a timely and important endeavour.

B. Brief survey of existing norms and rules

1. The notion of extraterritorial jurisdiction

4. The notion of extraterritorial jurisdiction may be understood as referring to the exercise of sovereign power or authority by a State outside of its territory. There are three aspects of this notion which may require consideration, namely, jurisdiction, extraterritoriality and applicable law.

5. The jurisdiction of a State may be understood as generally referring to the sovereign power or authority of a State.[4] More specifically, the jurisdiction of a State may be divided into three categories, namely: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.[5] Prescriptive jurisdiction refers to the authority of a State to adopt legislation

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[4] See, e.g., Bernard H. Oxman, "Jurisdiction of States", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 3 (Amsterdam: Elsevier Science Publishers, 1997), pp. 55-60, at p. 55.

[5] "The term 'jurisdiction' is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules (sometimes called the exercise of legislative jurisdiction or prescriptive competence), by establishing procedures for identifying breaches of the rules and the precise consequences thereof (sometimes called judicial jurisdiction or adjudicative competence), and by forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules (sometimes called enforcement jurisdiction or competence)." Bernard H. Oxman, supra note 4, at p. 55. See also, Roger O'Keefe, "Universal Jurisdiction", *Journal of International Criminal Justice*, vol. 2 (2004), pp. 735-760, at pp. 736-740; Frederick A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours ...* vol. 111 (1964-I), pp. 1-162, at p. 1; Derek W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", BYBIL, vol. 53 (1982), pp. 1-26, at pp. 1 ff; Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), at p. 297; Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997), at p. 452.

providing norms of conduct which govern persons, property or conduct. Adjudicative jurisdiction refers to the authority of a State to determine the rights of parties under its law in a particular case. Enforcement jurisdiction refers to the authority of a State to ensure compliance with its law. The consideration of the various types of jurisdiction may be important for two reasons. First, the internationally valid exercise of prescriptive jurisdiction in the adoption of a law is a prerequisite for the valid exercise of adjudicative or enforcement jurisdiction with respect to that law.[6] Second, the requirements for the lawful exercise of different types of jurisdiction may differ.[7] The potential interference resulting from the extraterritorial exercise of prescriptive jurisdiction is less than that resulting from either adjudicative or enforcement jurisdiction.

6. The notion of extraterritoriality may be understood in relation to a State as encompassing the area beyond its territory, including its land, internal waters, territorial sea as well as the adjacent airspace. The area beyond the territory of a State may fall within the territory of another State or may be outside the territorial jurisdiction of any State, namely the high seas and

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see, with respect to French-speaking literature, Patrick Dailler and Alain Pellet, *Droit international public*, 6th ed. (Paris: L.G.D.J., 1999), pp. 501 and 504, paras. 334 and 336; Pierre-Marie Dupuy, *Droit international public*, 7th ed. (Paris: Dalloz, 2004), at pp. 78 ff; Jean Combacau and Serge Sur, *Droit international public*, 6th ed. (Paris: Montchrestien, 2004) at pp. 343 ff.

[6] "If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful." Brownlie, supra note 5, p. 308; "It is widely assumed that a State may not enforce its rules unless it has jurisdiction to prescribe those rules." Bernard H. Oxman, supra note 4, at p. 55; "A state may employ judicial or nonjudicial measures to induce or compel compliance or punish non-compliance with its laws or regulations, provided it has jurisdiction to prescribe ...." *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute (ed.), 1987, para. 431(1), at p. 321. With respect to criminal law: "A Court cannot exercise jurisdiction in respect of an offence which the United States (or a State of the United States) could not constitutionally prescribe." *Restatement*, supra, para. 422, comment c, at p. 314. There are different views concerning the distinction between the second and third types of jurisdiction in view of the close relationship between the two. See for instance, with respect to literature addressing the adjudicative jurisdiction distinction, Robert Y. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. 1 - Peace, (1992), at p. 456; Michael Akehurst, "Jurisdiction in International Law", BYBIL, vol. 46 (1972-1973), pp. 145-257, at pp. 145 ff; Bernard H. Oxman, supra note 4, at p. 55.

[7] "These distinctions can be important in determining the limits of jurisdiction. The requisite contacts with a State necessary to support the exercise of jurisdiction differ depending on the nature of the jurisdiction being exercised." Bernard H. Oxman, supra note 4, at p. 55.

adjacent airspace[8] as well as outer space.[9] From a practical as well as a legal perspective, the organs of a State generally perform legislative, judicial or enforcement functions only within the territory of a State.[10] Principles of international law relating to the territorial integrity and independence of States prevent the organs of one State from being physically present or performing their functions in the territory of another State without the consent of the latter State.[11] Moreover, the exceptional cases in which a State has attempted to exercise its jurisdiction within the territory of another State by sending its officials to that State without consent are generally considered to be a violation of the territorial integrity and independence of another State.[12] Certain special situations in which the authorities of a State are physically present and exercise jurisdiction in the territory of another State, for example, in the case of diplomatic premises, consular premises and military bases located in the territory of another State are governed by specific rules of international law[13] rather than by international law concerning extraterritorial jurisdiction.

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[8] The most part of this matter is governed by treaties, e.g. art. 8 of the Treaty on International Penal Law, Montevideo, 19 March 1940, Organization of American States, *Treaty Series*, vol. 34, p. 71; arts. 1, 3 and 4 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation, Brussels, 10 May 1952, United Nations, *Treaty Series*, vol. 439, No. 6332, p. 233; arts. 5, 6 and 11 of the Convention on the High Seas, Geneva, 29 April 1958, United Nations, *Treaty Series*, vol. 450, No. 6465, p. 82; arts. 19 and 21 of the Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205.

[9] However, it should be noted that outer space law constitutes a separate field of international law which would not be appropriate for consideration under the present topic.

[10] In exceptional cases, a court of one State may sit in the territory of another State on the basis of an agreement between the States concerned. See *Lockerbie case*, Security Council resolution 1192 (1998), 27 August 1998, para. 4; verdict and the appeal of the Scottish Court, of 31 January 2001 and 14 March 2002 respectively available at: http://www.scotcourts.gov.uk/library/lockerbie/index.asp.

[11] The principles of the territorial integrity and the political independence of States are among those recognized in Article 2, paragraph 4, of the United Nations Charter. In the *Palmas Island* case, the sole arbitrator, Max Huber, observed as follows: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, UNRIAA, vol. II (1928), pp. 829-871, at p. 838. "The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter." Ian Brownlie, … supra note 5, at p. 306.

[12] "There are many cases in which states have claimed the right to their own law enforcement abroad.[5] But the (open or secret) performance of state acts on the territory of another state without its consent, such as the kidnapping of the Nazi criminal Eichmann in Argentina by Israel in 1960 and the kidnapping in the *Alvarez-Machain* case by US agents, or the sinking of *Rainbow Warrior* by French agents in a New Zealand harbour, although some are disputed, generally constitute violations of the principles of territorial integrity and non-intervention." Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London: Routledge, 1997), at p. 110.

7. As regards the applicable law, the notion of extraterritorial jurisdiction may be understood as referring to the exercise of jurisdiction by a State with respect to its national law in its own national interest rather than the application of *foreign law* or *international law*. A State's application of foreign law or international law rather than its own national law would therefore be excluded from the scope of this topic since these situations would not constitute the exercise of extraterritorial jurisdiction by a State in relation to its national law based on its national interests.

2. Principles of extraterritorial jurisdiction

8. The exercise of the jurisdiction or sovereign authority of a State is often provided for in the national law of a State. However, the lawfulness of the exercise of this jurisdiction or authority - including extraterritorial jurisdiction - is determined by international law.[14]

9. The decision of the Permanent Court of International Justice in the *Lotus* case may be regarded as the starting point for the consideration of the rules of international law governing the extraterritorial exercise of jurisdiction by a State.[15] The Court indicated that the jurisdiction of a State is territorial in nature and that a State cannot exercise jurisdiction outside its territory in the absence of a permissive rule of international law to the effect. However, the Court distinguished between the exercise of jurisdiction by a State outside its territory and the exercise of jurisdiction

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[13] Special agreements govern the exercise of jurisdiction by the sending or the receiving State with respect to military or civilian aliens present on a military base; see Helmut Rumpf, "Military Bases on Foreign territory", *in* Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, vol. 3 (Amsterdam: Elsevier Science Publishers, 1997), pp. 381-388, at pp. 381-382.

[14] The *Case of the S.S. "Lotus" (France v. Turkey)*, Judgment No. 9 of 7 September 1927, *P.C.I.J. Reports 1928*, Series A. No. 10, at pp. 18-19.

[15] *Ibid.* The *Lotus* case involved the exercise of adjudicative jurisdiction by Turkey with respect to the criminal responsibility of a French national on a French vessel for the deaths of Turkish nationals on a Turkish vessel resulting from a collision of the two vessels on the high seas after the French vessel had arrived at Istanbul.

by a State within its territory with respect to persons, property or acts outside its territory. The Court indicated that States have broad discretion with respect to the exercise of jurisdiction in the latter sense as follows:

> "Now the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
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> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."
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> ...
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> "In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction within these limits, its title to exercise jurisdiction rests in its sovereignty."

10. There have been a number of significant developments with respect to the extraterritorial jurisdiction of a State since the *Lotus* case was decided by the Permanent Court of International Justice in 1927. In particular, there are a number of principles of jurisdiction which may be asserted under contemporary international law in order to justify the extraterritorial jurisdiction of a State, including: (a) the "objective" territoriality principle; (b) the "effects doctrine"; (c) the protective principle; (d) the nationality principle; and (e) the passive personality principle. The common element underlying the various principles for the extraterritorial exercise of jurisdiction by a State under international law is the valid interest of the State in asserting its jurisdiction in such a case on the basis of a sufficient connection to the persons, property or acts concerned.

11. The *objective territoriality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts outside its territory when a constitutive element of the conduct sought to be regulated occurred in the territory of the State.

12. The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory a State which has a substantial effect within that territory. This basis, while closely related to the objective territoriality principle, does not require that an element of the conduct take place in the territory of the regulating State.

13. The *protective principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State. This principle of jurisdiction may be viewed as a specific application of the objective territoriality principle or the effects doctrine.

14. The *nationality principle* may be understood as referring to the jurisdiction that a State may exercise with respect to the activities of its nationals abroad, including natural persons as well as corporations, aircraft or ships.[16] This well-established principle of jurisdiction is based on the sovereign authority of a State with respect to its nationals.

15. The *passive personality* principle may be understood as referring to the jurisdiction that a State may exercise with respect to conduct abroad which injures one or more of its nationals. This principle of jurisdiction, which was contested by some States in the past, has gained greater acceptance in recent years.[17]

16. The *universality principle* may be understood as referring to the jurisdiction that any State may exercise with respect to certain crimes under international law in the interest of the international community. A State may exercise such jurisdiction even in situations where it has no particular connection to the perpetrator, the victim or the *locus situs* of the crime. Thus, a State may exercise such jurisdiction with respect to a crime committed by a foreign national against another foreign national outside its territory. However, a State exercises such

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[16] The nationality of a person, corporation, aircraft or ship depends upon the relevant rules of municipal law as well as international law. These rules have been addressed by the International Law Commission in its consideration of other topics.

[17] With respect to criminal law, see the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case Concerning the Arrest Warrant* of 11 April 2000 (infra note 23). See also Art. 4 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, United Nations, *Treaty Series*, vol. 704, No. 10106, p. 219; art. 5 of the International Convention against the Taking of Hostages, New York, 17 December 1979, United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205.

jurisdiction in the interest of the international community rather than exclusively in its own national interest, and thus, this principle of jurisdiction would fall outside of the scope of the present topic.

17. The principles relating to the extraterritorial jurisdiction of a State will be considered briefly in relation to fields of national law which are of particular relevance in this respect, namely, criminal law and commercial law.[18]

3. Extraterritorial jurisdiction with respect to particular fields of law

(a) Criminal law

18. The assertion of prescriptive or adjudicative jurisdiction by States in criminal law matters has traditionally been based on a number of well-established principles of jurisdiction. Although the "territoriality principle" is considered the primary basis for jurisdiction in criminal law matters,[19] the "objective territorial principle" and the "nationality principle" are also well-established.[20] In contrast, reliance on other principles such as the passive personality principle, the protective principle and the effects doctrine, has been more controversial. More recently however, the practice of States indicates a general tendency to broaden the classical

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[18] Extraterritorial jurisdiction may also be of growing relevance in the fields of immigration law and environmental law. The extraterritorial application of immigration laws has occurred with increasing frequency in recent years with respect to the interdiction of illegal aliens attempting to reach the shores of another State by sea as well as aliens suspected of terrorist activities. With regard to environmental law, A State may be tempted to regulate conduct or situations possibly producing harmful environmental effects on its own territory or at the global level, which occur in the high seas or in the territory of another State. See, e.g., Austen L. Parrish, "Trail Smelter déjà vu: extraterritoriality, international environmental law, and the search for solutions to Canadian-U.S. transboundary water pollution disputes", *Boston University Law Review*, vol. 85 (2005), pp. 363-430.

[19] The *Case of the S.S. "Lotus" (France v. Turkey)*, supra note 14, at p. 20.

[20] Common law countries tend to restrict the crimes over which they will exercise jurisdiction over their nationals abroad to very serious ones (such as treason, murder or bigamy). But they have never protested against the extensive use of the nationality principle as a basis for criminal jurisdiction. It is interesting to note in this respect that an act has been recently adopted by the US Congress, which establishes federal jurisdiction for crimes committed by civilians who accompany military forces outside the US, as well as crimes by former members of the military who leave active duty before being prosecuted by courts-martial. This Act, the Military Extraterritorial Jurisdiction Act of 2000 (Publ. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. 3261-67 (2002)) was intended to fill a jurisdictional gap with regard to crimes such as rape, arson, robbery, larceny and fraud (see Mark J. Yost and Douglas S. Anderson, "The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap", AJIL, vol. 95 (2001), pp. 446-454). See, for cases in common law countries, *United States v. Bowman* (260 U.S. 94 (1922)), *Blackmer v. United States* (284 U.S. 421 (1932)) or *United States v. Boshell* (952 F.2d 1101 (9th Cir. 1991)).

bases for criminal jurisdiction in relation to certain specific types of crimes committed abroad, which have a particularly international scope and effect, such as terrorism, cyber crimes and drug offences.[21]

19. The passive personality principle, according to which States have jurisdiction over crimes committed abroad against one of their nationals, although disputed in the past[22] is "now reflected … in the legislation of various countries … and today meets with relatively little opposition, at least so far as a particular category of offences is concerned".[23] In the field of terrorism, in particular, some States that were originally reluctant to apply the passive personality principle now acknowledge it as an appropriate basis for jurisdiction. Recent United States statutes[24] and jurisprudence[25] relating to terrorism constitute paradigmatic examples in this respect.

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[21] See, for such general enlargement regarding money laundering, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (Pub. L. No. 107-56, 115 Stat. 272 (2001)).

[22] Particularly the United States and the United Kingdom: see for instance *United States v. Columba-Colella* (604 F.2d 356 (5th Cir. 1979)) and *United States v. Vasquez-Velasco* (15 F.3d 833 (9th Cir. 1994)); see also the *Cutting* case (*in* John B. Moore, *Digest of International Law*, Washington, vol. 2 (1906), pp. 228-242) in which the US strongly protested Mexico's assertion of jurisdiction over a crime committed by a US citizen against a Mexican national in the US. See, however, the rejection by France in 1974 of the Israel's request for extradition of a Palestinian terrorist on the ground that this request was based on the passive personality principle (*cf.* Eric Cafritz and Omer Tene, "Article 113-7 of the French Penal Code: The Passive Personality Principle", *Columbia Journal of Transnational Law*, vol. 41 (2002-2003), pp. 585-599, at p. 594).

[23] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *I.C.J. Reports 2002*, at p. 77, para. 47. Indeed, the international practice shows that most of the States, the United States included, give effect to this principle but limit its application to particular crimes (regarding terrorism, see infra). With respects to the US, see e.g. *Restatement (Third) of the Foreign Relations Law of the United States*, supra note 6, para. 402, at p. 240) which states that the passive personality principle has not been generally accepted for ordinary torts or crimes; China, Italy, and Denmark limit the exercise of passive personality jurisdiction to certain classes of crimes or to crimes with a certain minimum degree of punishment; the dual criminality requirement is a statutory precondition to passive personality jurisdiction in Greece, Finland, Norway, and Sweden; the Norwegian Penal Code provides that only the king may commence legal proceedings based on passive personality jurisdiction; Finland, Italy, and Sweden also require executive consent for the application of the principle (Eric Cafritz and Omer Tene, supra note 22, at p. 594). Indeed, see in this respect the new article 113-7 of the French Penal Code which provides for the application of the passive personality principle to any kind of crime.

[24] See for instance 18 U.S.C.A. 2332a (a)(1) (2004) concerning the use of weapons of mass destruction in relation with terrorism; 18 U.S.C.A. 2332f (b)(2)(B) (2002) concerning the bombing of public uses, government facilities, public transportation systems and infrastructure facilities in relation with terrorism. With respects to France, see e.g. an act passed in 1975, Law no. 75-624 of July 11, 1975, *J.O.*, July 13, 1975, at p. 7219.

[25] See e.g. *United States v. Yunis* (681 F.Supp. 896 (1988)); *United States v. Vasquez-Velasco* (15 F.3d 833 (9th Cir. (1994)).

20. The protective principle, which allows States to exercise jurisdiction over aliens who have committed an act abroad which is deemed to constitute a threat to some fundamental national interests, although usually limited to very specific crimes and to political acts,[26] may be of particular relevance to new types of cyber crimes and terrorist offences. In this regard, some States have broadened their interpretation of the concept of "vital interests" in order to address terrorism security concerns and introduced the protective principle in their legislation[27] and applied it in some court cases.[28]

21. The "effects doctrine", which justifies a State's exercise of jurisdiction when a conduct performed abroad has substantial effects within that State's territory, has also recently been applied in criminal matters.[29] The national legislation of some States provides for an

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[26] See *Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime* (AJIL, vol. 29 (Supplement), pp. 435-652, at pp. 543 and 561); this draft Convention links the concept of "protection" to those of "security of the State" and "counterfeiting". The protective principle is also usually applied to crimes such as currency, immigration or economic offenses (Ian Brownlie, supra note 5, at p. 302). See e.g., with regards to national applications of the protective principle, decisions of US and UK courts, respectively *United States v. Pizzarusso*, 388 F.2d 8 (2th Cir. 1968), *United States v. Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980) and *Naim Molvan v. A.G. for Palestine* ((1948) AC 531, *Ann. Digest*, 15 (1948), 115), *Joyce v. D.P.P.* ((1946) AC 347, *Ann. Digest*, 15 (1948), 91).

[27] See e.g. 18 U.S.C.A. 2332f (b)(2)(E) (2002) concerning the bombing of public uses, government facilities, public transportation systems and infrastructure facilities in relation with terrorism; 18 U.S.C.A 2332g (b)(4) (2004) concerning missile systems designed to destroy aircraft in relation with terrorism.

[28] See for a recent case, *United States v. Ben Laden* (92 F. Supp. 2d 189 (S.D.N.Y. 2000)) in which the US court concluded that extraterritorial jurisdiction under the Anti-Terrorism Act was justified by the protective principle under International Law (*cf.* James T. Gathii, "Torture, Extraterritoriality, Terrorism, and International Law", *Albany Law Review*, vol. 67 (2003-2004), pp. 335-370, at p. 343); see, for older cases related to "terrorism", *Wechsler* (Conseil de Guerre de Paris, July 20, 1947, *J.D.I.*, vol. 44, at p. 1745), *In re Urios* ([1919-1922] Ann. Dig. 107 (No. 70 (Cour de Cassation, France, 1920)), *In re Bavot* ([1923-1924] Ann. Dig. 109 (No. 54) (Cour de Cassation, France, 1923)), *Nusselein v. Belgian State* ([1950] Ann. Dig. 136 (No. 35) (Cour de Cassation, Belgique, 1950)).

[29] Although in the jurisprudence of some States (mainly coming from the western European States), the territoriality principle seems to be the principle basis of jurisdiction relied upon for combating cybercrimes, it is interpreted in such a broad way that it may resemble an application of the effects doctrine or the protective principle. See, for apparent applications of the territoriality principle, the judgment of a British court regarding a pornographic content of an internet website (Southwark Crown Court, *R. v. Graham Waddon*, 30 June 1999, [2002] All ER 502) and the judgment of the Australian High Court, *Dow Jones & Company Inc. v Gutnick* ((2002) HCA 56 (10 December 2002)). But see, for broad interpretations of the territoriality principle resembling applications of the effects doctrine or the protective principle, the decision of the German Federal Court of Justice in the *Toben* case (BGH 46, 212, Urteil vom 12.12.2000) concerning the Holocaust denial on the Internet, and the decision of a French court, the *Yahoo!* case (*Yahoo! Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)). See Yulia A. Timofeeva, "World Wide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis", *Connecticut Journal of International Law*, vol. 20 (2005), pp. 199-225, at pp. 202 ff.

extraterritorial effect by allowing such legislation to apply to persons who merely conspire or intend to import drugs from abroad although no conduct has been performed on the territory of the State asserting jurisdiction.[30]

22. With regard to the jurisdiction to enforce, a State may not enforce its criminal law, that is, investigate crimes or arrest suspects, in the territory of another State without that other State's consent.[31] However, in some instance, States have sent representatives into the territory of another State in order to enforce their criminal law, by *inter alia* conducting investigations[32] or arresting suspects on the territory of other countries[33] with respect to terrorism, cyber crimes and drug trafficking.[34]

(b) Commercial Law

23. The increased globalization of the world economy has led States to rely increasingly on extraterritorial assertions of jurisdiction to protect their economic interests *vis-à-vis* multinational corporations and other global actors. Although the assertion of extraterritorial jurisdiction through national laws in the commercial sphere has engendered substantial resistance, in certain

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[30] See the statutes applied by the US Court in the *Noriega* case (*United States v. Noriega*, 117 F.3d 1206, at. 1515-19 (11th Cir. 1997)); see also the US Travel Act, 18 U.S.C. 1952 (a) (3) (2002).

[31] It should be noted however that the inability of a State to enforce its jurisdiction has been held by some national courts not to affect its ability to legislate or adjudicate the matter in question. See for instance the judgment of the federal Court of Justice in Germany in the *Toben* case (supra note 29) and the *Yahoo!* case (supra note 29).

[32] For instance, the US acknowledged having conducted recent investigations on Russian territory to search some data on the ground that these data would otherwise have been lost (see for further details Patricia L. Bellia, "Chasing Bits across Borders", *University of Chicago Legal Forum*, (2001), pp. 35-101, at p. 40).

[33] The important issue raised by these abductions was whether courts or tribunals had jurisdiction to judge people illegally brought before them. Case law is largely divided on this issue: regarding the US courts, see *Ker v. Illinois* (119 U.S. 436 (1866)), *Frisbie v. Collins* (342 U.S. 519 (1952)), *United States v. Yunis* (924 F.2d 1086 (D.C. Cir. 1991)) and *United States v. Alvarez-Machain* (504 U.S. 655 (1992)); but, see, for another solution given by a US court, *United States v. Toscanino* (500 F.2d 267 (2th Cir. 1974)); regarding other States: in Israel, the *Eichmann* case (District Court of Jerusalem, *Attorney General of Israel v. Eichmann* (1968) 36 ILR 5, case No. 40/61); in England, *Ex parte Susannah Scott*, 109 Eng. Rep 166 (K.B. 1829); but, see, for another solution given by a British court, *R. v. Horseferry Road Magistrates' Court* (Ex parte Bennett) (1993, 3 P. 138 (H.L)); in Canada, see *In re Harnett* (1973, 1 O.R.2d 206, 207 (Can)), in Germany, see the decision of the Federal Constitutional Court in which the Court ruled that an abducted person only needs to be returned when the victim nation objects to the abduction (39 Neue Juritische Wochenschrift 1427 (1986) (Ger. Fed. Const. Ct. 1985)); in South Africa, see *State (South Africa) v. Ebrahim* (1991, (2) SALR 553 (A)); see, in this respect, Yulia A. Timofeeva, supra note 29, at pp. 202 ff.

[34] It is usually asserted that such actions constitute a violation of the States' sovereignty, protected by art. 2 (4) of the UN Charter and, as far as abductions are concerned, an infringement of art. 5 of the ECHR provided that European States are involved (see, regarding the latter case, *Stocke v. Germany* - 11755/85 [1991] ECHR 25 (19 March 1991) and *Ocalan v. Turkey* - 46221/99 [2005] ECHR 282 (12 May 2005).

fields, such as competition law/antitrust law, there is some indication that such measures are slowly gaining acceptance. While the United States[35] remains the most active promulgator of extraterritorial measures in this field, other States and regional organizations such as the European Union,[36] France,[37] Germany[38] and, most recently, the Republic of Korea[39] have also adopted laws with extraterritorial application.

24. In commercial law, States have based their extraterritorial jurisdiction to prescribe primarily on the nationality principle and the "effects doctrine". The European Union, for example, has relied on an enlarged theory of nationality with respect to multinational

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[35] In this regard, two commercial laws of the United States can be highlighted: the Sherman Act of 1890 and the Sarbanes-Oxley Act of 2002. The first is the leading American antitrust law, which prohibits any contract, trust or conspiracy aiming to restrain interstate or foreign trade and any attempt or actual monopolisation of any part of this commerce. It provides for financial sanctions for engaging in any of those acts. The Sarbanes-Oxley Act of 2002 regulates the corporate governance of companies listed on the U.S. stock-exchange and "calls for application to all companies that list stock on the U.S. capital markets" without any exception for foreign companies". See Corinne A. Falencki, "Sarbanes-Oxley: Ignoring the Presumption against Extraterritoriality", *George Washington International Law Review*, vol. 36 (2004), pp. 1211-1236, at p. 1216.

[36] The European Union, despite its original resistance to extraterritorial jurisdiction and harsh criticisms towards American practice in this regard, also *de facto* extended its jurisdiction to control mergers, acquisitions and joint ventures outside the territories of its member States. Indeed, the Court of Justice of the European Communities recognized its own jurisdiction on some foreign corporations and their activities abroad and it applied to them the competition provision of Articles 81 and 82 of the Treaty Establishing the European Community (formerly Articles 85 and 86) and the Council Regulation on the Control of Concentrations Between Undertakings 4064/89 amended by the Council Regulations 1310/97. See David J. Feeney, "The European Commission's Extraterritorial Jurisdiction over Corporate Mergers", *Georgia State University Law Review*, vol. 19 (2002), pp. 425-491, at p. 427.

[37] The most well known example of this is the highly criticised provision of the French Civil Code on the adjudication by French courts of contracts signed abroad between a French person and a foreigner. See Jean Combacau and Serge Sur, supra note 5, at p. 354.

[38] German Act Against Restraints of Competition was initially enacted in 1957 and had several major revisions, the last one in 1998, with a last amended in 1999: Article 130 (2), states that "this Act shall apply to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area." Therefore, all prohibitions and notification requirements apply to activities which have a direct, reasonably foreseeable and significant (not necessarily substantial) effect. The Act has been regularly applied to foreign enterprises. (http://www.antitrust.de/ last visited 21 June 2006). See also A.V. Lowe, "The problems of extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution, ICLQ, vol. 34 (1985), pp. 724-746, at p. 736, citing also David J. Gerber, "The Extraterritorial Application of the German Antitrust Laws", AJIL, vol. 77 (1983), pp. 756-783.

[39] The Republic of Korea has also recently given an extraterritorial application of its national antitrust law. On 1 April 2005, the amended Monopoly Regulation and Fair Trade Act, providing for an extraterritorial application of the Act entered into force. This legal amendment aimed to make the law consistent with the recent practice of some Korean courts since 2002, to apply the domestic antitrust act to some foreign manufacturers. See Korea Fair Trade Commission decision of 4 April 2002 (case 02-77), confirmed by the Seoul High Court Decision of 26 August 2003 (2002nu 14647) and KFTC decision of 29 April 2003 (case 03-98); see also Youngjin Jung, "Korean Competition Law: First Step towards Globalization", *Journal of Korean Law*, vol. 4 (2005), pp. 177-200 and Won-Ki Kim, "The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea", *Singapore Journal of International and Comparative Law*, vol. 7 (2003), pp. 368-411.

corporations with local subsidiaries to establish jurisdiction over their activities.[40] The United States, on the other hand, has increasingly relied upon the "effects doctrine" to establish jurisdiction over the conduct of foreign actors abroad, as long as it is intended to and actually has an effect on the U.S. domestic market,[41] although with some international opposition.[42]

25. The extension of extraterritorial jurisdiction of a State and of the "effects doctrine" to cover activities contrary to the foreign policy interest of a State has proven particularly controversial. An example of this is the attempts by the United States to enforce economic sanctions against Cuba and Libya through extraterritorial measures such as the Helms-Burton Act and the D'Amato-Kennedy Law of 1996. Such measures provoked diplomatic protests, the adoption of blocking statutes and the institution of dispute resolution proceedings in the World Trade Organization by potentially affected States.[43] Eventually, it was agreed that the enforcement of the extraterritorial provisions of these measures would be suspended indefinitely.

26. Reliance by a State on the passive personality principle to establish adjudicative jurisdiction in the commercial law context has also proven controversial in regard to a provision of the French civil code allowing for any dispute arising from a contract between a French national and a foreigner to be adjudicated in a French court.[44]

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[40] CJEC, *Imperial Chemical Industries v. Commission of the European Community*, case 48/69, 14 July 1972; *Europemballage Corp. and Continental Can Co. v. Commission of the European Community*, case 6/72, 21 February 1973; *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission of the European Community*, joined cases 6 et 7/73, 6 March 1974. See also David J. Feeney, supra note 36, at p. 426 and Joseph J. Norton, "The European Court of Justice Judgment in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position", *Denver Journal of International Law and Policy*, vol. 8 (1979), pp. 379- 414.

[41] See, e.g., *F. Hoffman-LaRoche, Ltd. v. Empagran*, 542 U.S. 155, 124 S. Ct. 2359 (2004).

[42] "The so-called 'effects' doctrine of territorial jurisdiction, whatever its precise content and criteria, has developed considerable controversy in international legal circles and has been the subject of heated discussion within the Community". Joseph J. Norton, supra note 40, at p. 385.

[43] See infra section IV.

[44] See Jean Combacau and Serge Sur, supra note 5, at p. 354.

27. As regards enforcement jurisdiction, although the extraterritorial assertion of enforcement jurisdiction without the consent of the territorial State is generally prohibited under international law, States have in some instances concluded international agreements to allow for the extraterritorial enforcement of their commercial and competition laws.[45]

C. Consequences of the invalid assertion of extraterritorial jurisdiction

28. The assertion of extraterritorial jurisdiction by a State is entitled to recognition by other States only to the extent that it is consistent with international law. In the event that one State exercises extraterritorial jurisdiction that another State judges excessive, the other State may oppose such an exercise of jurisdiction in a number of different ways. Examples of such opposition have included diplomatic protests,[46] non-recognition of laws,

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[45] See Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended (among EC member States), ILM vol. 29 (1990) p. 1413; Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (among EC and EFTA member States), ILM vol. 28 (1989), p. 620; Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (among OAS members), ILM vol. 18 (1979) p. 1224; Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments, ILM vol. 24 (1985), p. 468; and Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters, *Official Journal* L. 012, 16/01/2001, pp. 0001-0023. See also the International Monetary Fund Agreement, which provides under Article VIII.2 "that exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member". See A.V. Lowe, supra note 38, at p. 732.

[46] For example, both the European Community and the United Kingdom submitted protests when the United States amended its Export Administration Regulations in such a way as to prohibit the export of oil or natural gas exploitation equipment to the Soviet Union. The Comments of the European Community laid out the provisions of the disputed measures and stated, *inter alia*: "The United States measures as they apply in the present case are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of United States nationality in respect of their conduct outside the United States and particularly the handling of property and technical data of these companies not in the United States." See Note and Comments of the European Community on the Amendments of 22 June 1982 to the Export Administration Act, presented to the United States Department of State on 12 August 1982; Note on the same subject presented by the Government of the United Kingdom on 18 October 1982; and a further *aide-mémoire* presented by the European Community on 14 March 1983, in A.V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Limited, 1983), p. 197, at p. 201. Other examples of diplomatic protests made in response to extraterritorial exertions of jurisdiction include: Aide-mémoire by Japan of 23 August 1960 and 20 March 1961 to the United States Department of State, *ibid.*, at p. 121 (extract); Aide-mémoire by the United Kingdom to the Commission of the European Communities, 20 October 1969, *ibid.*, at p. 144.

orders and judgments;[47] legislative measures such as "blocking statutes"[48] and "claw-back statutes";[49] judicial measures such as injunctions;[50] and the institution of international proceedings.[51] The limitation on the recognition of extraterritorial jurisdiction as well as possible responses to invalid assertions of such jurisdiction could be addressed in the draft.

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[47] "Where a state or its courts have acted contrary to international law, including the rules relating to the exercise of jurisdiction, other states are in international law entitled (but not compelled) to refuse to give effect to any legal act . . . . In practice, most states, in their rules of private international law, ensure that a foreign state's laws and decisions which exceed the limits of jurisdiction permitted by international law are not recognized or enforced abroad." Robert Y. Jennings and A. Watts, supra note 6, at p. 485. In particular, some States generally decline to give effect to the public laws of other States, such as revenue, penal and confiscatory law. See generally *ibid.*, at pp. 488-498.

[48] A blocking statute is a law adopted by State disputing the validity of the exertion of jurisdiction designed to impede the enforcement of the disputed provision, often by creating a direct conflict of laws. Such provisions may, *inter alia*, prohibit cooperation in foreign court proceedings or investigations, prohibit compliance with extraterritorial laws of other States, declare judgments based on such measures unenforceable, and allow the recovery of damages suffered as a result of such measures. As a result of the foreign State compulsion doctrine discussed infra, blocking statutes may have the additional effect of limiting the enforceability of an extraterritorial measure even in the State promulgating such a measure. In States that apply this doctrine, a national court would not require compliance with the extraterritorial measure in question, since compliance would involve a violation of the laws of the territorial State. For example, several States adopted protective measures in response to the United States' adoption of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (also known as the "Helms-Burton Act"), which sought to penalize non-U.S. companies for doing business with Cuba. Canada amended its Foreign Extraterritorial Measures Act (R.S.C., ch. F-29, § 3 (1985), amended by ch. 28, 1996 S.C. (Can.)); Mexico adopted the Law of Protection of Commerce and Investments from Foreign Policies that Contravene International Law (available at <http://www.cddhcu.gob.mx/leyinfo/doc/63.doc>); and the European Union adopted Regulation 2271/96 (Council Regulation (EC) 2271/96, 1996 O.J. (L 309) 1-6). See John Boscariol, "An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States", *Law and Policy in International Business*, vol. 30 (1999), pp. 439-499, at pp. 441-2, 471-474 (describing Canada's Foreign Extraterritorial Measures Act); Alexander Layton and Anharad M. Parry, "Extraterritorial Jurisdiction - European Reponses", *Houston Journal of International Law*, vol. 26 (2004), pp. 309 325, at pp. 311-12 (describing the United Kingdom's Protection of Trading Interests Act of 1980, c. 11 § 1(1)(b)(Eng.)); Harry L. Clark, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures", *University of Pennsylvania Journal of International Economic Law*, vol. 20 (1999), pp. 61-96, at pp. 81-92. See also A.V. Lowe, supra note 46, at pp. 79-219 (containing texts of blocking statutes from various States).

[49] See, e.g., EU Council Regulation 2271/96, Art. 6, 1996 O.J. (L 309) 1; Foreign Extraterritorial Measures Act, Canada, supra note 47, §9(1)(a).

[50] For example, in *U.S. v. Imperial Chemical Industries*, a British company was able to obtain an injunction from a British court restraining a party in the case from enforcing an extraterritorial order of the United States court. See Robert Y. Jennings and A. Watts, supra note 6, at p. 477, note 50 (citing, *inter alia*, *U.S. v. Imperial Chemical Industries* (1952) F.Supp 215).

[51] "In principle excess of jurisdiction gives rise to state responsibility even in absence of an intention to harm another state." Ian Brownlie, supra note 5, at p. 312. Thus, States have been able to seek redress in international fora for improper exercises of jurisdiction. The most relevant example of such recourse is the *Lotus* case itself, where France sought damages for Turkey's allegedly excessive assertion of jurisdiction. In the Eichmann case, the dispute over Israel's assertion of enforcement jurisdiction in Argentina was brought before the Security Council, and a settlement was reached between the two States.

D. Priority in the event of competing valid jurisdictions

29. There may be situations in which the State asserting extraterritorial jurisdiction is the only State that has any connection to the relevant person, property or situation which is beyond the territory of any State. In such a case, the State would have exclusive jurisdiction. More often the extraterritorial jurisdiction of a State coincides with the jurisdiction of one or more other States - notably the territorial State. The concurrent jurisdiction of States may give rise to disputes concerning priority of jurisdiction. The question arises as to the relationship between extraterritorial jurisdiction and territorial jurisdiction in terms of priority.[52] In this regard, it may be necessary to distinguish between legislative or adjudicative jurisdiction and enforcement jurisdiction.

30. Questions of priority in the event of competing jurisdictions as a consequence of the assertion of extraterritorial jurisdiction most frequently arise with respect to legislative or adjudicative jurisdiction. Some States have developed general principles or rules for resolving these situations. For example, the national court of one State may be called upon to apply extraterritorially the legislation of another State. In order to minimize the likelihood of conflicts and to show deference to foreign States, national courts in some States have adopted a presumption against the extraterritorial application of their own national law.[53] Thus, unless there is a specific indication that a certain law or regulation was intended to apply to foreign nationals for actions committed abroad, a court will consider that no such intent existed on the part of the legislature. Such a rule is based in part on principles of comity and non-interference in the domestic affairs of other States, as well as practical considerations.

31. Another rule developed by courts to deal with competing assertions of jurisdiction resulting from extraterritorial measures is the foreign State compulsion doctrine. The foreign State compulsion doctrine provides that a party should not be held criminally or civilly liable for

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[52] See Robert Y. Jennings and A. Watts, supra note 6, at p. 458 ("Territoriality is the primary basis for jurisdiction; even if another state has a concurrent basis for jurisdiction, its right to exercise is limited if to do so would conflict with the rights of the state having territorial jurisdiction"); Patrick Dailler and Alain Pellet, supra note 5, at pp. 498-9, 502 ("La rigidité des solutions théoriques résultant de la hiérarchie des compétences et, en particulier, de la primauté de la souveraineté territoriale sur la compétence personnelle, qui exclut en principe toute application, au moins forcée, du droit national à l'étranger …").

[53] See Frederick A. Mann, supra note 5, at pp. 63-64; *F. Hoffman-LaRoche v. Empagran*, 542 U.S. 155, 124 S. Ct. 2359, U.S. Supreme Court, 14 June 2004 ("*First*, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.")

undertaking an activity in another State that is required under the laws of that State.[54] Therefore, an extraterritorial measure in direct conflict with a criminal law of the territorial State would not be applied by a competent court, even if it determined that the assertion of jurisdiction was reasonable.

32. Questions of competing jurisdiction do not often arise with respect to enforcement jurisdiction. As a general rule, States are not allowed to enforce their laws in the territory of another State without the *consent* of the territorial State. As the Permanent Court of International Justice stated in the *Lotus* case "a State … may not exercise its power in any form in the territory of another State."[55] Thus, when Israel captured Adolf Eichmann on Argentine soil and subsequently transferred him to Israel for trial, the Security Council requested the Government of Israel to make appropriate reparation to Argentina.[56]

E. Elaboration of an instrument

33. An instrument on this topic could aim at setting forth general principles and more specific rules governing the assertion of extraterritorial jurisdiction under public international law. The overview of the existing norms and rules indicates that there is a considerable amount of State practice relating to the assertion of extraterritorial jurisdiction which the Commission could draw upon in the elaboration of such an instrument.

34. Recent developments in technology and the globalization of the world economy, which limit the ability of States to protect their national interests by relying solely on traditional principles of jurisdiction, have contributed to the increasing level of disagreement and uncertainty with respect to certain aspects of the law governing extraterritorial jurisdiction. The elaboration of a draft instrument on the topic may therefore require substantial progressive development of the law in addition to codification. While State practice indicates several strong trends in the emergence of new rules or the extension of traditional rules which may guide the

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[54] See Harry L. Clark, supra note 48, at pp. 92-93; Ian Brownlie, supra note 5, at p. 308 (citing Judge Robert Y. Jennings, BYBIL, vol. 33, 1957, pp. 146-176, at p. 151); Richard K. Gardiner, *International Law* (London: Pearson Education Ltd., 2003), at p. 325; Robert Y. Jennings and A. Watts, supra note 6, at pp. 464-5.

[55] The *Case of the S.S. "Lotus" (France v. Turkey)*, supra note 14.

[56] S.C. resolution 138 (1960). But cf. *Attorney General of the Government of Israel v. Adolf Eichmann*, ILR, vol. 36, p. 5; *U.S. v. Alvarez-Machain*, 504 U.S. 655, United States Supreme Court (1992).

Commission in resolving the areas of disagreement and thereby provide greater clarity and certainty in an area of international law which is of increasing practical importance, the elaboration of a draft instrument on the topic could prove to require some progressive development of the law.

Scope of the topic

35. The delimitation of the scope of the topic will be important in light of the breadth of the topic of jurisdiction in general. While some attempts at codification have considered extraterritorial jurisdiction from the broader perspective of jurisdiction in general,[57] the topic may be limited to extraterritorial assertions of jurisdiction only. Moreover, the topic may be restricted only to national law applied extraterritorially.

36. There are some fields of law in which questions of extraterritorial jurisdiction are likely to arise which are regulated to some extent by special regimes. Paramount amongst these are the law of the sea, outer space law, international humanitarian law and tax law. In addition, assertions of extraterritorial jurisdiction with respect to judicial and police assistance and cooperation as well as the recognition and enforcement of foreign judgments are, for the most part, regulated by existing international, regional or bilateral agreements. While these special rules may provide some guidance in the elaboration of general principles and rules with respect to extraterritorial jurisdiction, the draft instrument would be without prejudice to existing legal regimes.

37. Although the extraterritorial assertion of jurisdiction by States can often result in concurrent or conflicting attempts to exercise jurisdiction, it would not be necessary to revisit the rules of private international law developed by States to resolve such conflicts. However, it may be useful to include general principles of comity that are of particular relevance to the resolution of disputes resulting from assertions of extraterritorial jurisdiction.

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[57] *Harvard Research in International Law, Draft Convention on Jurisdiction with respect to Crime*, supra note 26, p. 439; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, supra note 6. It should be noted that the Restatement, in particular, is of limited relevance for present purposes since it focuses primarily on United States practice.

38. One aspect of the topic which has not been fully addressed in previous codification efforts is the consequences of invalid assertions of extraterritorial jurisdiction. Although this aspect is to some extent addressed by the articles on the responsibility of States for internationally wrongful acts, there is also a sizeable body of State practice in this regard that could be explored in an effort to establish rules and procedures for resolving the specific issues that may arise in disputes relating to invalid assertions of extraterritorial jurisdictional.

Definitions

39. Defining the main concepts to be contained in an instrument would be one of the essential elements of the study. Definitions of the terms "jurisdiction" and "extraterritorial" are crucial to determining the scope of the draft text. Further consideration of the topic may indicate additional terms that would also need to be clearly defined in the draft.

40. The notion of the *jurisdiction* of a State may be understood as generally referring to the sovereign power or authority of a State. In this regard, a distinction could be drawn between three types of jurisdiction, namely prescriptive, adjudicative and enforcement jurisdiction.

41. The notion of *extraterritoriality* may be understood as referring to the area beyond the territory of a State, including its land, internal waters, territorial sea as well as the adjacent airspace. Such an area could fall within the territory of another State or outside the territorial jurisdiction of any State.

Core principles of extraterritorial jurisdiction

42. It is generally accepted that in order for a State to validly assert its jurisdiction over a natural or legal person, property or situation, it must have some connection to such person, property or situation. The types of connections that may constitute a sufficient basis for the exercise of extraterritorial jurisdiction are reflected in the general principles of international law which govern the exercise of such jurisdiction by a State. These principles are as follows:

- Territoriality principle as it relates to extraterritorial jurisdiction
  - Objective territoriality principle
  - Effects doctrine
- Nationality principle
- Passive personality principle
- Protective principle

43. Any assertion of extraterritorial jurisdiction must be based on at least one of the above-mentioned principles to be valid under international law. More than one of the above principles may be relevant in determining the validity of extraterritorial jurisdiction in a particular case depending on the circumstances.

Rules relating to the assertion of extraterritorial jurisdiction

44. The degree of the connection that a State must have with a person, property or situation in order to validly assert its jurisdiction extraterritorially may vary according to the type of jurisdiction the State is attempting to exercise. Accordingly, it would be necessary to indicate the extent to which the various jurisdictional principles may provide a valid basis for the extraterritorial assertion of prescriptive, adjudicative or enforcement jurisdiction. The exercise of extraterritorial jurisdiction may also raise special issues with respect to particular fields of law, such as those relating to cyber crimes in the field of criminal law or e-commerce in the field of commercial law. It may be therefore also be useful to include specific provisions to address these types of special issues which may not be adequately addressed by the formulation of general principles and rules.

Limitations on the rights of States to assert extraterritorial jurisdiction

45. Assertions of extraterritorial jurisdiction are subject to limitations based on certain fundamental principles of international law such as the sovereign equality of States, the principle of the territorial integrity of a State and the principle of non-intervention in the domestic affairs of other States, as enshrined in the Charter of the United Nations. Considerations of comity should also be taken into account in the application of assertions of extraterritorial jurisdiction.

Consequences of invalid assertions of extraterritorial jurisdiction

46. In the event of an assertion of extraterritorial jurisdiction by one State which another State considers invalid under international law, States have a general obligation to cooperate to resolve the dispute. A legal instrument on this subject should also envisage a procedure for resolving such a dispute that would involve: giving notice that the assertion of jurisdiction is considered invalid; reviewing the validity of the assertion by the enacting State in light of the core principles, and taking into account the objections of the affected State.

Proposed outline for an instrument on extraterritorial jurisdiction

I. General provisions
   1. Scope of application
   2. Relationship to other legal regimes
      (a) *Lex specialis*
      (b) Pre-existing treaty regimes
   3. Use of terms

II. Principles of jurisdiction
   1. Territoriality principle
      (a) Objective territoriality principle
      (b) Effects doctrine
   2. Nationality principle
   3. Passive personality principle
   4. Protective principle

III. Extraterritorial assertion of jurisdiction
   1. Prescriptive jurisdiction
   2. Adjudicative jurisdiction
   3. Enforcement jurisdiction
   4. Specific fields of law

IV. Limitations on the extraterritorial assertion of jurisdiction

  1. Sovereignty, territorial integrity and non-intervention

  2. Comity

    (a) Presumption against extraterritoriality

    (b) Foreign State compulsion doctrine

    (c) Principle of reasonableness

V. Dispute resolution

  1. General duty to cooperate

  2. Duty to give notice

  3. Duty to review extraterritorial measures

  4. General right to countermeasures

  5. Dispute resolution mechanism

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